Supreme Court, U.S.
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In the

Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory authority of the United States Forest Service to manage public lands includes the authority to preserve in-stream flows for federally protected species by ordering private parties to stop diverting stream water, through ditches they built long ago on federal land, thereby confiscating their water rights vested under state law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Early Winters Ditch Company, Inc., a nonprofit corporation organized under the laws of Washington, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. Introduction 2

B. Legal Background 4

C. Factual Background 6

1. The Ditches and Water Rights 6

2. Section 7 Consultation Process 7

D. The District Court Decision 8

E. The Ninth Circuit Decision 9

REASONS FOR GRANTING THE WRIT 11

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE—THE UPSETTING OF THE DELICATE FEDERALISM BALANCE EXISTING IN WELL-SETTLED WATER LAW JURISPRUDENCE 11

A. The Ninth Circuit's Opinion Raises Significant Federalism Concerns by Establishing Federal Authority to Reallocate State Water When the Water Crosses Federal Land 11

TABLE OF CONTENTS—Continued

Page

B. The Ninth Circuit's Opinion Erodes a Delicate Federalism Balance by Allowing States to Control Water Within Their Own Borders Only Insofar as the Water Is Present on State or Private Land 13

II. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT'S OPINION ALLOWING THE FOREST SERVICE TO TAKE OVER A STATE'S PRIMARY ROLE IN WATER ALLOCATION CANNOT BE UPHELD BY REFERENCE TO FEDERAL LAND MANAGEMENT LAWS AND CONSEQUENTLY POSES AN IMPORTANT QUESTION 15

A. The Forest Service Has No Authority Under the Organic Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for Wildlife Preservation 16

B. The Forest Service Has No Authority Under the Multiple-Use Sustained-Yield Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish 17

C. The Forest Service Has No Authority Under the Federal Land Policy and Management Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish 18

TABLE OF CONTENTS—Continued

Page

III. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE ENDANGERED SPECIES ACT CREATES FEDERAL AUTHORITY TO TAKE OVER FROM THE STATES THE RIGHT TO ALLOCATE WATER RIGHTS AND THEREBY CONFISCATE PRIVATE WATER RIGHTS FOR FISH PROTECTION 21

IV. THIS COURT SHOULD GRANT REVIEW TO ADDRESS IMPORTANT CONSTITUTIONAL CONCERNS 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

American Forest and Paper Association v. United States EPA, 137 F.3d 291 (5th Cir. 1998) 22

California v. ARC America Corp., 490 U.S. 93 (1989) 23-24

California v. United States, 438 U.S. 645 (1978) 11, 13

Churchill County v. Babbitt, 150 F.3d 1072 (9th Cir. 1998) 22

County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003) 1

Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) 5, 23

John v. United States, 247 F.3d 1032 (9th Cir. 2001) 19

National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976) 5

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 962 F.2d 27 (D.C. Cir. 1992) 21-22

R.D. Merrill Company v. Washington Pollution Control Hearings Board, 969 P.2d 458 (Wash. 1999) 3

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 24

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) 21, 23

TABLE OF AUTHORITIES—Continued

Page

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 24

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 11

Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) 19

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001) 24

United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126 (E.D. Cal. 1992) 23

United States v. New Mexico, 438 U.S. 696 (1978) .. passim

United States v. Union Gap Irrigation Company, 209 F. 274 (E.D. Wash. 1913) 3

Washington Department of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993) 24

Statutes

16 U.S.C. § 475 5-6

§ 528, *et seq.* 6, 17

§ 1531(c)(2) 22

§ 1534(a) 22

§ 1535(a) 22

§ 1536(a)(2) 4

§ 1536(b) 4

§ 1536(b)(4) 5

TABLE OF AUTHORITIES—Continued

Page

§ 1538(a)(1)(B) 23

§ 1540(g) 1

28 U.S.C. § 1254 2

§ 1331 1

§ 2201 1

§ 2202 1

43 U.S.C. § 1701, Savings Provisions § 701 of Pub. L. No. 94-579 at (h) 19

§ 1701(g)(1), Historical Note 19-20

§ 1701(g)(2), Historical Note 19-21

§ 1701(h), Historical Note 6

§ 1761 5

Wash. Admin. Code § 173-548-020 (2003) 6

Wash. Rev. Code Ann. § 90.03.010 (West 2004) 12

§ 90.03.247 (West 2004) 12

§§ 90.03.250-90.03.340 (West 2003) 6

§§ 90.03.250-90.03.340 (West 2004) 3

§§ 90.22.010-90.22.020 (West 2004) 12

Rules and Regulations

36 C.F.R. § 251.53 (2004) 5, 9

50 C.F.R. § 402.02 (2004) 5

62 Fed. Reg. 43,937 (Aug. 18, 1997) 7

63 Fed. Reg. 31,647 (June 10, 1998) 7

TABLE OF AUTHORITIES—Continued

Page

64 Fed. Reg. 14,308 (Mar. 24, 1999) 7

Miscellaneous

30 Cong. Rec. 966 (1897) 16

Tarlock, D., *Law of Water Rights and Resources* (2001) 3, 6

PETITION FOR WRIT OF CERTIORARI

County of Okanogan, Early Winters Ditch Company, Inc., David C. Jones, and Frances A. Kaul (Water Owners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The October 29, 2003, opinion of the Ninth Circuit Court of Appeals is reported at *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003). It and the judgment are reproduced herein at Appendix (App.) A. The Ninth Circuit's order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* on October 24, 2003, is reproduced and included herein at App. B. The original unpublished opinion of August 14, 2003, which was the subject of the Petition for Rehearing and Suggestion of Rehearing En Banc, and was replaced by the published decision issued on October 29, 2003, is reproduced and included herein at App. C. The district court's opinion is included herein at App. D.

JURISDICTION

This case was filed in the United States District Court for the Eastern District of Washington. The statutory basis for jurisdiction of the district court is 28 U.S.C. § 1331, due to the presence of a federal question; 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and 16 U.S.C. § 1540(g) (Endangered Species Act (ESA)).

The Ninth Circuit Court of Appeals entered a decision on August 14, 2003. Thereafter, Petitioners sought rehearing and rehearing *en banc*. The court denied rehearing and rehearing *en*

banc on October 24, 2003, but issued a new memorandum opinion and judgment on October 29, 2003, replacing its previous decision and judgment issued August 14, 2003. This Petition for Writ of Certiorari follows. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS AT ISSUE

The Organic Administration Act of 1897 (Organic Act) is found at 16 U.S.C. § 475. It is set out at App. E.

The Multiple-Use Sustained-Yield Act is found at 16 U.S.C. § 528. It is set out at App. F.

The Federal Land Policy and Management Act is found at 43 U.S.C. § 1701, *et seq.* Relevant provisions are set out at App. G.

The Endangered Species Act, sections 7 and 9, are found at 16 U.S.C. §§ 1536 and 1538. Relevant provisions of those sections are set out at App. H and I.

STATEMENT OF THE CASE

A. Introduction

This controversy involves the confiscation of privately owned water rights by the Forest Service. The Forest Service shut down irrigation ditches, at the point of diversion, crossing federal land so that the water would instead remain in streams and could be used by the Forest Service to maintain flow levels thought beneficial to fish. The Forest Service had no authority to do this.

Approximately one-hundred-years ago, the Petitioners/ Water Owners in this case who are Okanogan farmers and the irrigation companies they formed, obtained from the State of

Washington rights to this irrigation water. These water rights are firmly established private property rights. Specifically, the water rights at issue here are controlled by the State of Washington under the Western states' law of prior appropriation. In Washington, a water right includes not only the use of the water, but also the point from which the water is diverted, or the point of diversion. Wash. Rev. Code Ann. §§ 90.03.250-90.03.340 (West 2004); D. Tarlock, *Law of Water Rights and Resources* §§ 5:42, 5:60-70 (2001) (noting a water right is a "bundle of sticks" comprised of a type of beneficial use, a quantity of water, a season of use, a point of diversion, and a priority date). Indeed, the point of diversion is just as important as the quantity of water. Tarlock, *supra*, § 5:65 ("[A] physical diversion has long been listed as one of the essential elements of a valid appropriation."); *United States v. Union Gap Irrigation Company*, 209 F. 274, 276-77 (E.D. Wash. 1913) (change in point of diversion would impair federal water right); *R.D. Merrill Company v. Washington Pollution Control Hearings Board*, 969 P.2d 458, 462-63 (Wash. 1999) (requiring state approval for change in point of diversion). Thus, in this case, the water right is the right granted by the State of Washington to divert the specified quantity of water from the specified point.

Consistent with the Organic Act and subsequent land management statutes, the Water Owners built two irrigation ditches on unreserved public land to deliver this water across it to their private farmland. Later, the Water Owners obtained special use permits from the Forest Service required to allow them to maintain the irrigation ditches. However, through the Section 7 consultation process of the Endangered Species Act of 1973, the Forest Service has now confiscated the Water Owners' irrigation water for in-stream, fishery protection purposes, by prohibiting them from diverting it into the irrigation ditches.

The Forest Service's use of Section 7 of the ESA to extinguish the Water Owners' water rights circumvents established law that the Forest Service has no right to seize already appropriated waters, *United States v. New Mexico*, 438 U.S. 696, 717 (1978), and that Section 7 does not create new, independent regulatory authority to regulate private water rights. Thus, by shutting off the Water Owners' water and confiscating it to increase river flows to benefit fish, the Forest Service has acted outside its scope of authority. But most importantly and seriously, the Forest Service has turned Western water law upside down by stripping from the State of Washington and taking for itself the power to allocate water rights on federal land within the state.

B. Legal Background

Section 7(a)(2) of the ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

16 U.S.C. § 1536(a)(2). Although by its terms Section 7 applies only to activities involving federal agencies, consultation may involve private parties needing federal permits. Section 7 requires federal agencies to consult with the National Marine Fisheries Service or the Fish and Wildlife Service, depending on the species, to determine whether the activity will jeopardize the species or adversely modify critical habitat. This consultation process results in the issuance of a biological opinion. *Id.* § 1536(b).

The biological opinion's purpose is to determine whether and how an activity may impact a listed species and to prescribe conditions under which the activity may be carried out to minimize adverse impacts. One function of the biological opinion is to suggest "reasonable and prudent alternatives" to the proposed action if the action is found to jeopardize a listed species or adversely modify its critical habitat. *Id.* § 1536(b)(4).

When undertaking a Section 7 consultation, the National Marine Fisheries Service and the Fish and Wildlife Service must consider the comprehensive effects of the federal agency action. *See, e.g., National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976). However, the "reasonable and prudent alternatives" may condition only the federal aspect of the proposed action. *See* 50 C.F.R. § 402.02 (2004) (" '[R]easonable and prudent alternatives' refer to alternative actions . . . that can be implemented . . . consistent with the scope of the Federal agency's legal authority and jurisdiction . . . ."). The Section 7 consultation does not allow the wildlife agencies to regulate those aspects of a federally permitted project that are entirely private and over which the agency has no authority. *Environmental Protection Information Center (EPIC) v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001). A federal agency's mere involvement in private conduct, or the retention of some discretionary control, does not confer upon a federal agency the power to regulate every aspect of a private activity. *Id.* at 1083.

The Forest Service's regulatory authority is governed primarily by the Federal Land Policy and Management Act. That Act governs the regulation and use of irrigation rights-of-way across national forest land. *See* 43 U.S.C. § 1761; 36 C.F.R. § 251.53 (2004). Although the Federal Land Policy and Management Act repealed portions of prior laws, it did not alter the basic policy aims of the national forests as outlined in the Organic Act, 16 U.S.C. § 475 ("for the purpose of securing

favorable conditions of water flows, and to furnish a continuous supply of timber") and the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 ("for outdoor recreation, range, timber, watershed, and wildlife and fish purposes"). Instead, the Federal Land Policy and Management Act required that federal agencies "grandfather" valid existing rights. 43 U.S.C. § 1701(h), Historical Note.

C. Factual Background

1. The Ditches and Water Rights

Early Winters Ditch Company, Inc. (Early Winters), and Skyline Ditch Company (Skyline) deliver water to families and small businesses in the Methow Valley so they can water livestock and grow animal feed, small grain crops, and orchards. These irrigators rely on water rights established and used beneficially for, in most cases, more than 100 years. The State of Washington has developed a complex legal framework for the assignment and protection of these water rights and for the protection of instream flows in the Methow Valley. Wash. Admin. Code § 173-548-020 (2003). Pursuant to Washington law, the Water Owners' water right includes both the use of a specified quantity of water and the point from which the Water Owners divert the water. Wash. Rev. Code Ann. §§ 90.03.250-90.03.340 (West 2003); Tarlock, *supra*, §§ 5:42, 5:60-5:70.

Early Winters claims a water right in the flow of the Methow River under state law with a priority date of 1909.[1] Beginning in 1910, the Forest Service issued a special use permit to Early Winters regulating maintenance of the irrigation ditch.[2] On April 15, 1998, the Forest Service renewed the Early

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[1] App. at A-4.

[2] App. at A-4.

Winters permit for a period of years expiring December 31, 2006.[3]

On January 12, 1903, Skyline filed documents with the United States Department of the Interior establishing the organization of Skyline as an unincorporated association of water users and provided a plat of the irrigation ditch crossing portions of unreserved public land.[4] The Secretary of the Interior approved the Skyline irrigation ditch on July 7, 1903.[5] Beginning only in 1971, the Forest Service issued a special use permit to Skyline regulating maintenance of the ditch.[6]

2. Section 7 Consultation Process

In 1997, the National Marine Fisheries Service listed the Upper Columbia River population of steelhead as an endangered species. 62 Fed. Reg. 43,937 (Aug. 18, 1997). In 1998, the Fish and Wildlife Service listed the Columbia River bull trout as a threatened species under the ESA. 63 Fed. Reg. 31,647 (June 10, 1998). In 1999, the National Marine Fisheries Service listed the Upper Columbia River population of chinook salmon as an endangered species. 64 Fed. Reg. 14,308 (Mar. 24, 1999). Fish belonging to these populations can be found in the Methow River Basin.

In 1998, the Forest Service requested Section 7 consultations with the National Marine Fisheries Service and the Fish and Wildlife Service on the effects of renewing the

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[3] App. at D-2.

[4] App. at A-3.

[5] App. at A-3.

[6] App. at A-3.

Skyline[7] and Early Winters special use permits on these various species.[8] The National Marine Fisheries Service issued final biological opinions for Early Winters on August 2, 2000, and for Skyline on September 8, 2000,[9] resulting in the Forest Service prohibiting Early Winters and Skyline water diversions. These prohibitions, designed to take the Water Owners' vested water and use it to enhance fish habitat, have given rise to this case.[10]

D. The District Court Decision

The district court decided this case on cross motions for summary judgment. The court concluded that Forest Service's authority to keep the Water Owners' water in-stream by denying them the right to divert into the irrigation ditches did not involve a question of water rights but, instead, the ability to exercise power over federal land.[11] The court did acknowledge the federal government has no power to seize state-granted water rights, and if this case were about that, the Water Owners would prevail under *United States v. New Mexico*.[12] Nonetheless, relying exclusively upon the Multiple-Use Sustained-Yield Act, the court upheld the Forest Service's action that directly led to the Forest Service seizing the Water Owners' water rights because it found wildlife preservation was

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[7] App. at A-5.

[8] App. at A-5.

[9] App. at A-5 to A-6.

[10] App. at D-2.

[11] App. at D-3.

[12] App. at D-7.

a valid aim of national forest management.[13] Thus, the Forest Service could shut off the Water Owners' water diversion to serve that federal purpose, despite the fact it seized the Water Owners' water in doing so.

The court acknowledged shutting off the water might have been unlawful prior to the Multiple-Use Sustained-Yield Act, because the Organic Act did not provide that national forests could be managed for wildlife purposes.[14] However, the district court's acknowledgment failed to recognize that the Forest Service's regulations rely only on the Federal Land Policy and Management Act, not the Multiple-Use Sustained-Yield Act, for regulatory authority. *See* 36 C.F.R. § 251.53 (citing only the Federal Land Policy and Management Act). Nevertheless, the court found the Federal Land Policy and Management Act did not diminish the Forest Service's authority under the Multiple-Use Sustained-Yield Act to shut off the Water Owners' water,[15] and as a result confiscate that water for increased fishery flows.

E. The Ninth Circuit Decision

The Ninth Circuit affirmed. It construed this case, like the district court, as one involving Forest Service authority to manage federal land for the benefit of fish pursuant to traditional federal land management statutes. While it observed correctly that "the ESA does not grant powers to federal agencies they do not otherwise have,"[16] it found such power unnecessary, ruling the Forest Service had authority for its actions under not only the Multiple-Use Sustained-Yield Act but the Federal Land Policy and Management Act. It even

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[13] App. at D-5 to D-7.

[14] App. at D-6 to D-7.

[15] App. at D-9.

[16] App. at A-8.

found, unlike the district court, that the Forest Service had authority for its actions under the Organic Act.[17]

While the court acknowledged the primary power of states to manage water resources and allocate water rights among their inhabitants, it failed to recognize that allowing the Forest Service to stop the Water Owners' from diverting their privately owned irrigation water has resulted in the federal government taking over that fundamental power from the states. This petition, then, arises from the Ninth Circuit's opinion that upholds the Agency's unfettered authority to take control of water rights allocations from the states once the water crosses federal land and take that private water when the purpose is to benefit wildlife. This is a dramatic finding that expands federal authority over private, state-granted water rights to a point never before experienced. This is the first time any court has ever granted the federal government such water allocation authority and has the potential to bring chaos to the jurisprudence of not only Washington State water law, but the jurisprudence of water law throughout the entire west most of which is within the jurisdiction of the Ninth Circuit.

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[17] App. at A-10.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE—THE UPSETTING OF THE DELICATE FEDERALISM BALANCE EXISTING IN WELL-SETTLED WATER LAW JURISPRUDENCE

A. The Ninth Circuit's Opinion Raises Significant Federalism Concerns by Establishing Federal Authority to Reallocate State Water When the Water Crosses Federal Land

The Ninth Circuit's opinion results in the Forest Service gaining the power to manage water resources Congress reserved exclusively to the states for more than a century under federal law. *See California v. United States*, 438 U.S. 645, 653 (1978) (noting the history of federal land management and water law in the western United States exhibits a "consistent thread of purposeful and continued deference to state water law by Congress"). This deference is evident in no less than 37 federal statutes where Congress requires federal agencies to defer to state water law. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-59 (1982). Moreover, this Court has observed that the state's control over water rights has its origins not only in federal statutes but in the Constitution. *California*, 438 U.S. 654-55; *New Mexico*, 438 U.S. at 698. The Ninth Circuit's decision stands to impact not only the State of Washington, but other states within the Ninth Circuit's vast jurisdiction.

Under the Equal Footing Doctrine, the states, including Washington, acquired sovereignty over their unappropriated water upon admission to the Union. *California*, 438 U.S. at 654-55. The State of Washington promulgated a statute asserting Washington's dominion over water resources:

> Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise . . . ."

Wash. Rev. Code Ann. § 90.03.010 (West 2004). In Washington State, water rights are managed under the doctrine of prior appropriation. *Id.* Under that doctrine, water rights are created and assigned a priority based on a date when the water right was first put to beneficial use. *Id.* An appropriation can only be approved by the Washington Department of Ecology (Ecology) under specific procedures and limitations. Wash. Rev. Code Ann. §§ 90.22.010-90.22.020 (West 2004). Ecology's authority over water is exclusive:

> No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive . . . .

Wash. Rev. Code Ann. § 90.03.247 (West 2004).

The Ninth Circuit's opinion resulted in a sudden diminishment of state power and allowed the Forest Service to take over the State of Washington's exclusive power to allocate water resources when the purpose is to protect endangered species. In so doing, the Ninth Circuit allowed the Forest Service to reorder the priority of water rights by placing the Water Owners' irrigation water back in-stream where other junior water appropriators who are not subject to Forest Service regulation may use the water. This is a confiscation of the Water Owners' water, promotes unprecedented federal power over water rights, and is wrong. The petition for certiorari should be granted to reaffirm that states, not federal agencies, have domain over their water resources.

B. The Ninth Circuit's Opinion Erodes a Delicate Federalism Balance by Allowing States to Control Water Within Their Own Borders Only Insofar as the Water Is Present on State or Private Land

The Ninth Circuit holds the federal government possesses command and control of state water if it is merely present on federal land. By so holding, the Ninth Circuit opens a Pandora's box concerning upstream and downstream use issues and, with a single decision, disrupts almost 200 years of Western water law.

Because the Ninth Circuit allowed the Forest Service to circumvent state authority over state water, the State of Washington now has competing federal and state frameworks for managing water—depending solely on whether the water is present on federal land or state land. Both Congress and this Court have spoken directly on this conflict:

> A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.

California, 438 U.S. at 668-69. The result of the Ninth Circuit's opinion is precisely what Congress and this Court have repeatedly found unacceptable for more than 200 years. *Id.*

Indeed, in *New Mexico*, this Court noted the significance of state water rights in the West in light of federal water claims. 438 U.S. at 696. In light of the Forest Service's instant assertion of authority over state water that merely crosses federal land, the Ninth Circuit should not have ignored the magnitude of the sea change in water law that would occur were it to blindly accept it. As this Court has observed:

> The percentage of federally owned land . . . in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%. . . . Because federal reservations are normally found in the uplands of the Western States rather than the flat lands, the percentage of water flow originating in or flowing through the reservations is . . . impressive. More than 60% of the average annual water yield in the 11 Western States is from federal reservations.

Id. at 699 n.3. Given the extreme size of federal land-holdings in the Western states and the scarcity of water in the West, defining the Forest Service's authority to regulate state water found on federal land has incredibly far-reaching effects. With but a single decision, the Ninth Circuit conceivably transferred to the federal government control over more than 60% of the average annual water yield in 11 Western states.

In *New Mexico*, the Forest Service claimed a right to water held pursuant to private water rights granted by state law. *Id.* at 703. This Court noted that the Forest Service did not own such a right and that, in the arid West, the Forest Service's claim would "inescapably vie with other public and private claims." *Id.* at 699. The Court recognized that, because water was scarce, any gain in water sought by the Forest Service would result in a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.* at 705.

The Ninth Circuit's decision conflicts with two centuries of Western water law and congressional enactments, and decades of this Court's precedent. Even more importantly, the Ninth Circuit's decision eviscerates the Western states' authority over the management and allocation of water rights. This Court should grant the petition to restore to the Western states, most of which are within the jurisdiction of the Ninth Circuit, their control over water rights.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT'S OPINION ALLOWING THE FOREST SERVICE TO TAKE OVER A STATE'S PRIMARY ROLE IN WATER ALLOCATION CANNOT BE UPHELD BY REFERENCE TO FEDERAL LAND MANAGEMENT LAWS AND CONSEQUENTLY POSES AN IMPORTANT QUESTION

The Ninth Circuit held that federal land management statutes give the Forest Service authority over water that crosses its land and as a result has given the agency direct power to reallocate and confiscate vested water rights already allocated by the State of Washington. In so doing, the Ninth Circuit's decision turns on its head the water law jurisprudence relied on by a majority of Western states discussed in the previous section by allowing a federal agency to displace the state's primary role in allocating state water resources. The scope of the Forest Service's authority over private water rights under the Organic Act, the Multiple-Use Sustained-Yield Act, and the Federal Land Policy and Management Act is consequently an important issue this Court should review.

The Ninth Circuit's decision results in federal authority that conflicts expressly with this Court's position in *New Mexico*, 438 U.S. at 706-18, upholding a state's primary authority over its water resources. The Ninth Circuit distinguished and in essence set aside *New Mexico*, by stating that case "did not address the power of the Forest Service to restrict the use of rights-of-way over federal land."[18] However, in *New Mexico*, this Court discussed in-depth federal authority under the Organic Act and the Multiple-Use Sustained-Yield Act, including the overriding purposes for which Congress

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[18] App. at A-10.

created national forests and how subsequent legislative grants of authority impact federal authority over water resources.

This Court concluded that national forests serve two purposes: (1) conserving water flows for irrigation and domestic purposes and (2) furnishing a continuous supply of timber. As a result, this Court held that federal authority over federal lands in the Organic Act and the Multiple-Use Sustained-Yield Act does not provide federal agencies authority to reallocate water resources and confiscate private water rights. Accordingly, *New Mexico* should have guided the Ninth Circuit's analysis but, unfortunately, the Ninth Circuit instead declined to follow this Court's precedent.

A. The Forest Service Has No Authority Under the Organic Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for Wildlife Preservation

This Court clarified in *New Mexico* that Congress passed the Organic Act to secure favorable conditions of water flows. 438 U.S. at 707-09. According to the Court, this authority concerns *only* facilitating irrigation and domestic use purposes. *Id.* at 715, 717 n.24. This comports with the fundamental purpose for which Congress enacted the Organic Act—facilitating the utilization of our nation's forests as renewable resources for economic purposes. *Id.* at 707-08 (citing 30 Cong. Rec. 966 (1897)). Indeed, the Court noted specifically that, under the Organic Act, "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." 438 U.S. at 707-08.

In contrast, Congress created *national parks* for non-economic purposes—*including preservation of fish and wildlife*. *New Mexico*, 438 U.S. at 709. Thus, had Congress sought to preserve the Okanogan National Forest to benefit fish and wildlife, it would have created the Okanogan National

Park. Instead, Congress created the Okanogan *National Forest* to conserve water flows for irrigation and domestic purposes.

Nonetheless, the Ninth Circuit upheld the Forest Service's seizure of the Water Owners' vested water rights for the purpose of benefitting fish, citing as authority the Organic Act. But this Court in *New Mexico* rejected any notion that the Organic Act authorized federal agencies to reserve resources to "improve and protect" fish and wildlife. *Id.* at 711. Thus, the Ninth Circuit improperly distinguished this Court's precedent and has allowed the Forest Service to usurp state authority over the allocation of water rights in direct contravention of long-established water law jurisprudence.

B. The Forest Service Has No Authority Under the Multiple-Use Sustained-Yield Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish

The Ninth Circuit also cited the Multiple-Use Sustained-Yield Act as granting the Forest Service authority to regulate federal land even though such regulation shut off the Water Owners' water, since the regulation was to benefit fish.[19] But in *New Mexico*, this Court held that the Multiple-Use Sustained-Yield Act did not expand the scope of federal agencies' authority to regulate federal land use to include the reallocation of state water resources. This Court clarified that Congress' purposes in the Multiple-Use Sustained-Yield Act are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Act]." *Id.* at 713 (quoting 16 U.S.C. § 528, *et seq.*). Thus, this Court determined that Congress' purposes for national forests in the Multiple-Use Sustained-Yield Act supplement and promote those in the Organic Act. Indeed, "the Multiple-Use Sustained-Yield Act . . . does not . . . broaden the

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[19] App. at A-9.

purposes for which the [forest] was established under the Organic Act." 438 U.S. at 713.

Accordingly, the Ninth Circuit should have analyzed the Forest Service's authority under the Multiple-Use Sustained-Yield Act from this Court's pronouncement that "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." *Id.* at 708. Because the Ninth Circuit found authority where Congress had provided none, the Ninth Circuit's holding will "mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable condition of water flow." *Id.* at 715. Thus, the Ninth Circuit again misinterpreted a federal land management statute to provide the Forest Service with authority to do indirectly what it may not do directly, reallocate a state's water rights in contravention of western water law jurisprudence. In so doing, the Ninth Circuit contradicted not only this Court's reasoning, but the purposes for which Congress established national forests as set forth in the Organic Act and the Multiple-Use Sustained-Yield Act.

C. The Forest Service Has No Authority Under the Federal Land Policy and Management Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish

According to this Court, if the Forest Service covets state water to benefit fish, it must acquire it under state law like any other water user consistent with the concepts of Western water law jurisprudence. *New Mexico*, 438 U.S. at 702. Misconstruing this Court's pronouncement, the Ninth Circuit held the Forest Service can use its authority under the Federal Land Policy and Management Act to do indirectly what it has no authority to do directly, reallocate private water rights granted under state law thereby confiscating them in order to benefit fish. However, the Forest Service's authority under the

Federal Land Policy and Management Act does not include the authority, whether direct or indirect, to confiscate private water rights.

Indeed, on this point Congress was specific in limiting the Forest Service's authority. The Federal Land Policy and Management Act provides that the Forest Service does not have authority under the Act to eliminate valid existing rights. The statute specifically states that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701, Savings Provisions § 701 of Pub. L. No. 94-579 at (h). "All authorities are in agreement that the 'subject to valid existing rights' language was essentially designed to restrain agencies from effecting a taking. *See Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (citing *Utah v. Andrus*'s holding with approval)." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996). Thus, as water rights are property rights under state law, *see, e.g.*, *John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001), Congress did not provide authority in the Federal Land Policy and Management Act to confiscate private water rights granted under state law.

The Forest Service's authority also should be construed in light of other Federal Land Policy and Management Act provisions limiting the Forest Service's authority over pre-existing rights. Section 701 expressly preserves federal deference to state control over water resources and prohibits Forest Service actions that diminish or interfere with existing water rights created and administered under state law. 43 U.S.C. § 1701. For example, the Forest Service may not construe its authority:

> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control . . . .

Id. § 1701(g)(1)-(2), Historical Note.

Thus, in its wisdom, Congress did not attempt to modify Western water law by giving the Forest Service authority to take over a state's responsibility to allocate or reallocate water rights. Nonetheless, the Ninth Circuit held that the Federal Land Policy and Management Act specifically authorizes the Forest Service to shut off the Water Owners' water "without any requirement that the Forest Service defer to state water law."[20]

No dispute exists that the Forest Service may regulate federal land pursuant to the Federal Land Policy and Management Act. However, and more importantly here, no dispute exists either that the Water Owners possess water rights granted by the State of Washington to a specific quantity of water with a specific point of diversion and the Forest Service has no authority to take it over for fish. By seizing the Water Owners' water or interfering with the Water Owners' point of diversion, the Forest Service eliminates vested, existing water rights in contravention of the Federal Land Policy and Management Act and this Court's precedent. The Ninth Circuit stated: "[The Federal Land Policy and Management Act] specifically authorizes the Forest Service to restrict such rights-of-way . . . without any requirement that the Forest Service defer to state water law."[21] Yet, Congress explicitly stated the contrary: "Nothing in this Act . . . shall be construed as . . . expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources

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[20] App. at A-10.

[21] App. at A-10.

development or control . . . ." 43 U.S.C. § 1701(g)(2), Historical Note.

Thus, Congress did not provide the Forest Service with authority in the Federal Land Policy and Management Act to extinguish private water rights by seizing appropriated water. To resolve the conflict between the Ninth Circuit's expansion of the scope of federal power under the Organic Act, the Multiple-Use Sustained-Yield Act, and the Federal Land Policy and Management Act, this Court's pronouncements in *New Mexico*, and Congress' express language, this Court should grant the petition.

III

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE ENDANGERED SPECIES ACT CREATES FEDERAL AUTHORITY TO TAKE OVER FROM THE STATES THE RIGHT TO ALLOCATE WATER RIGHTS AND THEREBY CONFISCATE PRIVATE WATER RIGHTS FOR FISH PROTECTION

The Ninth Circuit's opinion upheld the Forest Service's use of Section 7 consultation to reallocate water to in-stream fishery purposes thereby confiscating private water rights used for irrigation. However, this expansive ruling ignores established law that Section 7 of the ESA does not add to federal agencies' existing authority and consequently provides no more authority than other federal land management statutes. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Indeed,

> the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 962 F.2d 27, 34 (D.C. Cir. 1992) (citations omitted). Moreover, not only does Section 7 not enlarge federal authority, it "confers no substantive powers" whatsoever. *American Forest and Paper Association v. United States EPA*, 137 F.3d 291, 298 (5th Cir. 1998). Thus, because Congress did not provide the Forest Service authority to confiscate private water rights in derogation of state law in any other statute, the Ninth Circuit erred in finding such authority through the ESA.

Indeed, by its own terms, the ESA does not authorize federal agencies to confiscate water rights. Rather, the ESA expressly authorizes and provides a funding source for federal agencies to implement programs to conserve fish and other species through the acquisition of lands, waters, or interests therein by purchase or donation. 16 U.S.C. § 1534(a). Moreover, before acquiring such interests, federal agencies must cooperate and consult with the states. *Id.* § 1535(a).

Thus, the ESA itself recognizes the compelling interests of state and local governments in water resource management and declares: "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Id.* § 1531(c)(2); *see also Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998) (Federal agencies must consider impacts to local government water supplies before implementing programs to purchase water rights.).

Adhering to these principles will not inhibit the Forest Service's ability to carry out its statutory responsibilities under the ESA. The Water Owners claim the Forest Service has no authority over vested water rights under Section 7 of the ESA. However, this does not mean federal agencies do not have the power to protect listed species. On the contrary, the Water Owners merely contend that those federal agencies with responsibility to protect endangered species, the Fish and

Wildlife Service and the National Marine Fisheries Service must exercise their ESA authority under Section 9 rather than Section 7. *See Sierra Club*, 65 F.3d at 1512; *accord EPIC*, 255 F.3d at 1083. Indeed, a ruling requiring federal agencies to seek a remedy through Section 9 would serve the ESA's goals without impairing the Water Owners' vested water rights.

Specifically, Section 9 of the ESA prohibits the "take" of a listed species through actions such as killing, injuring, or harming a protected species. 16 U.S.C. § 1538(a)(1)(B). Section 9 actually provides broader protection for listed species than Section 7 because it applies to nonfederal actions and parties, including the exercise of water rights. *See United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992) (enjoining the use of private water rights until repair of irrigation ditch fish screen to prevent take of salmon). Here, Section 9, not Section 7, is the proper framework Congress provided for analyzing the duties and obligations of nonfederal water rights holders under the ESA. *See EPIC*, 255 F.3d at 1083 (noting Section 9 protects listed species when Section 7 does not apply). Accordingly, this Court should grant the petition to address the important question of whether independent powers are granted federal agencies under the ESA that would allow them to take from states their authority over water allocations leading to the power to confiscate private water rights.

IV

THIS COURT SHOULD GRANT REVIEW TO ADDRESS IMPORTANT CONSTITUTIONAL CONCERNS

There is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States" and " 'with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.' " *California*

v. ARC America Corp., 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court recently reiterated that presumption in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001):

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power.

Id. at 172-73 (citations omitted). The regulation of water resources is a primary responsibility and right of the states, *id.* at 174, yet the Ninth Circuit ignored the principle.

The Ninth Circuit also approved of the Forest Service shutting off the Water Owners' water despite the fact it constitutes an unconstitutional encroachment on private property rights. *See Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001) (When a water right is diminished to enhance instream flows for the benefit of ESA-listed fish, a physical taking results requiring just compensation under the Fifth Amendment.). Indeed, the Washington Supreme Court "has consistently held that rights of users of water for irrigation purposes are vested rights in real property." *Washington Department of Ecology v. Grimes*, 852 P.2d 1044, 1052-53 (Wash. 1993).

Federal confiscation of private water rights held under state law via the imposition of instream flow limits does not

constitute mere regulatory conditions. When the Forest Service imposed its in-stream flow conditions by shutting off the water flowing in the Water Owners' irrigation ditches, the Forest Service appropriated a water right.

Because of these constitutional concerns, the Ninth Circuit should have construed the Forest Service's authority to avoid infringing on the powers reserved to the states. This Court should grant the petition to ensure these constitutional questions are properly considered.

CONCLUSION

The Ninth Circuit's holding that the Forest Service possesses authority to confiscate private water rights appropriated under state law contradicts this Court's precedents and Congress' pronouncements limiting federal authority over state water and defining the purposes for which national forests were established. *United States v. New Mexico*, 438 U.S. 696. Moreover, the Ninth Circuit's opinion establishes dual systems of federal and state water rights, contradicting centuries of Western water law and its delicate, yet firm, federalism balance.

This Court should grant the Petition for Writ of Certiorari and reverse the holding of the Ninth Circuit.

DATED: January, 2004.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	No. 02-35512
	)	D.C. No. CV-01-00192-RHW
Plaintiffs-Appellants,	)	OPINION
v.	)	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE, U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	)	
Defendants-Appellees,	)	
WASHINGTON ENVIRONMENTAL COUNCIL; OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW	)	

AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 9, 2003—Seattle, Washington
Memorandum Filed August 14, 2003
Memorandum Withdrawn October 29, 2003
Filed October 29, 2003

Before: Thomas M. Reavley,* A. Wallace Tashima, and Richard A. Paez, Circuit Judges.

Opinion by Judge Reavley

COUNSEL

Russell C. Brooks, Pacific Legal Foundation, Bellevue, Washington, for the plaintiffs-appellants.

Andrew C. Merger, Department of Justice, Washington, D.C., for the defendants-appellees.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

John B. Arum, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for the defendants-intervenors-appellees.

OPINION

REAVLEY, Circuit Judge:

Appellants, plaintiffs below, challenge a decision by the United States Forest Service requiring reduced use of water from ditches in time of low flow, intended to protect certain endangered species of fish. The plaintiffs include Okanogan County, the Early Winters Ditch Company, and several other plaintiffs. The district court granted summary judgment in favor of the federal defendants. We affirm.

BACKGROUND

Plaintiffs use water from the Skyline Irrigation Ditch and the Early Winters Ditch. These ditches traverse the Okanogan National Forest and divert water to plaintiffs for agricultural and other purposes. The Okanogan National Forest was originally set aside as the Washington Forest Reserve in 1897.

The Skyline Irrigation Ditch can be traced to 1903 when the Skyline Ditch Company applied to the Secretary of Interior for a permit to construct and maintain a ditch to take water from the Chewuch River. The permit was granted in July 1903, subject to a contract, which stated:

> It is further agreed and understood that the permission herein granted is subject to revocation by the Secretary of the Interior, in his discretion, at any time, notwithstanding the period for which this agreement is approved may not have then expired.

There followed a special use permit which provided: "Terminable at the discretion of the Forester of the U.S. Department of Agriculture." In 1971, the permit was renewed with a "revocable and nontransferable" special use permit, providing that it may be terminated "at the discretion of the

regional forester or the Chief, Forest Service." This permit further stated that it could be renewed only if the permittee "will comply with the then-existing laws and regulations governing the occupancy and use of National Forest Lands." The permit was renewed in 1979 and 1987, with permits again stating that they were revocable.

The record traces the Early Winters Ditch to 1909, when Harry Briggs and others stated their intent under state law to take water from the Early Winters Creek. The Forest Service granted Briggs a special use permit in 1910 for the Early Winters Ditch, stating that the permittee "shall comply with all the laws and regulations governing National Forests" and that the permit "shall terminate . . . at the discretion of the Forester." The permit was renewed several times. All the later permits were terminable at the discretion of the Forest Service, and further provided that the permit "confers upon the permittee no right to use the water involved." Beginning with the 1971 permit, the Early Winters permits further provided a fixed expiration date and provided that they were subject to renewal only if the permittee complies "with the then-existing laws and regulations governing the use and occupancy of National Forest Lands."

All of the subsequent permits for the two ditches contained similar conditions, stating, for example, that new permits would be issued "in the absolute discretion of the Forest Service," that the permits could be amended at the discretion of the Forest Service to incorporate new terms required by law, and that the permit holder shall comply with all applicable federal laws and standards, including "relevant environmental laws." These permits also stated that they do "not convey any legal interest in water rights as defined by applicable State Law."

Under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, the National Marine Fisheries Service (NMFS)

listed the steelhead trout and chinook salmon as endangered species, and the Fish and Wildlife Service (FWS) listed the bull trout as a threatened species. The 1998 special use permits were sent with notices stating:

> Please note that the consultation process for this ditch has not been completed with the [NMFS] for the steelhead trout and the chinook salmon nor with the [FWS] for the bull trout. When the consultation is completed, it may be necessary to amend this permit to include conditions which may be required by the [NMFS] or the [FWS].

The ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . .

16 U.S.C. § 1536(a)(2). Under ESA regulations, an agency is required to consult with either the FWS or the NMFS (the consulting agencies) whenever a federal action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a) (2002). The designated consulting agency under the ESA makes certain determinations and issues a biological opinion under 16 U.S.C. § 1536(b).

In 1998, the Forest Service made biological assessments for all special use permits on the Chewuch River. It concluded that the Skyline Irrigation Ditch was one of the two largest water diversion ditches on the river, and that the ditch's fish screen was ineffective in protecting the steelhead trout. It concluded that continued operation of the ditch was likely to adversely affect the steelhead and chinook salmon. It similarly

found that the Early Winters Ditch was likely to adversely affect the steelhead and chinook by adversely affecting nesting and spawning areas.

The Forest Service initiated formal consultation with the NMFS and FWS. In 2000, NMFS issued biological opinions for the two ditches. It concluded that a proposed plan for the Early Winters Ditch that included using wells in lieu of surface water diversions during low flow conditions was not likely to jeopardize the steelhead and chinook. However, with respect to the Skyline Irrigation Ditch, the NMFS concluded that proposed modifications to the headgate and the fish screen were insufficient, and that the action as proposed was "likely to jeopardize the continued existence of both steelhead and spring chinook salmon and result in the destruction or adverse modification of designated critical habitat."

Under 16 U.S.C. § 1536(b)(4), agency action can be found not to violate the ESA if "reasonable and prudent alternatives" are implemented, and can be approved subject to the implementation of "reasonable and prudent measures." As to the Skyline Irrigation Ditch, the biological opinion found that measures were necessary to "increase the amount of water in the Chewuch River during low flow periods." The Forest Service therefore amended the Skyline Irrigation Ditch special use permit, requiring that instream flows on the river be measured and that diversions to the ditch be limited to maintain certain instream flows. As to the Early Winters Ditch, the biological opinion found that the proposed plan was acceptable under the ESA provided that reasonable and prudent measures were taken including the maintenance of a minimum instream flow for the creek.

The plaintiffs brought this suit for a declaratory judgment, alleging that the actions of the NMFS, the FWS, and the Forest Service concerning the renewals of the special use permits for the two ditches were unconstitutional and exceeded the

agencies' statutory authority. The court heard cross-motions for summary judgment and granted summary judgment in favor of the federal defendants.

DISCUSSION

Appellants argue that the Forest Service lacked the authority to restrict the use of the ditches to maintain instream flow levels for the protection of fish under the ESA. We agree with the district court that the placement of restrictions in the right-of-way permits was within the authority of the Forest Service.

Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments, and the Early Winters Ditch Company as a permit holder indisputably has standing. We accordingly proceed to the merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (holding that where one plaintiff has standing, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit").

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The ditch rights-of-way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The more recent permits expressly state that they do not convey water rights and are subject to amendment "when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations promulgated thereunder require federal agencies to consult with designated consulting agencies whenever a

federal action "may affect" a threatened or endangered species. *See* 50 C.F.R. § 402.14(a) (2002). The regulations provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights-of-way, *id.* § 402.02(c).

Appellants do not argue on appeal that the Forest Service or the other federal agencies violated any of the requirements or protocols of the ESA. Instead, they in effect argue that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.

[1] There is authority that the ESA does not grant powers to federal agencies they do not otherwise have. The Supreme Court has stated that section 7 of the ESA "amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1979) (emphasis added, brackets omitted) (quoting 119 Cong. Rec. 42913 (1973)).

[2] However, we are of the view that the Forest Service had the authority to restrict the use of the rights-of-way to protect the endangered fish. The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way.

[3] The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights-of-way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or

pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." These statutes, in our view, give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

[4] The FLPMA provides that "[n]othing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act," and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, *reprinted in* 43 U.S.C.A. § 1701 historical note. Under this savings clause, the government could not under the FLPMA divest a private party of an existing "land use right" or other "valid existing rights," but as described above, the plaintiffs' rights-of-way were always, by their written terms, revocable at the discretion of the federal government. Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right-of-way permits did not grant vested property rights. The 1901 Act

stated that the Secretary of the Interior could grant rights-of-way through forest reservations for ditches, but that "any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (codified at 43 U.S.C. § 959) (repealed 1976).

[5] Appellants rely on *United States v. New Mexico*, 438 U.S. 696 (1978) ("*US v. NM*"). This case held that under a longstanding "implied-reservation-of-water doctrine," *id.* at 701, Congress did not, in enacting the Organic Administration Act and the MUSYA, intend the federal government to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. *US v. NM* did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. As discussed above, the FLPMA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law. To quote another Supreme Court case, the pending case "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917).

AFFIRMED.

Appendix A–11

JUDGMENT **FILED NOV. 3, 2003**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35512
CT/AG#: CV-01-00192-RHW

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL

Plaintiffs - Appellants

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest;

Defendants - Appellees

WASHINGTON ENVIRONMENTAL COUNCIL, Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife (for purposes of this case are collectively referred to as WEC); OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE

Defendant-Intervenors - Appellees

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 29, 2003

Appendix B–1

FILED OCT. 24, 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	No. 02-35512
	)	DC No. CV 01-192 RHW
	)	E.D. Washington
Plaintiffs - Appellants,	)	
v.	)	**ORDER**
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	)	
Defendants - Appellees,	)	
WASHINGTON ENVIRONMENTAL COUNCIL, Washington	)	

Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife (for purposes of this case are collectively referred to as WEC); OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors - Appellees.

Before: REAVLEY, TASHIMA, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Paez vote to deny the petition for rehearing en banc and Judge Reavley so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix C–1

FILED AUG. 14, 2003

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	No. 02-35512 D.C. No. CV-01-192-RHW
Plaintiffs-Appellants,	MEMORANDUM*
v.	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE, U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	
Defendants-Appellees,	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. Rule 36-3.

WASHINGTON ENVIRONMENTAL COUNCIL; OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Before: REAVLEY,** TASHIMA, and PAEZ, Circuit Judges.

Appellants argue that the Forest Service lacked the authority to restrict the use of the Early Winters Ditch and the Skyline Irrigation Ditch to maintain instream flow levels for the protection of fish under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44. We agree with the district court that the placement of restrictions in the right of way permits was within the authority of the Forest Service, and affirm.

Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments, and the Early Winters Ditch Company as

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** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

a permit holder indisputably has standing. We accordingly proceed to the merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (holding that where one plaintiff has standing, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit").

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights of way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The ditch rights of way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The more recent permits expressly state that they do not convey water rights and are subject to amendment "when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations promulgated thereunder require federal agencies to consult with designated consulting agencies whenever a federal action "may affect" a threatened or endangered species. *See* 50 C.F.R. § 402.14(a) (2002). The regulations provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights of way, *id.* § 402.02(c).

Appellants do not argue on appeal that the Forest Service or the other federal agencies violated any of the requirements or protocols of the ESA. Instead, they in effect argue that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.

There is authority that the ESA does not grant powers to federal agencies they do not otherwise have. The Supreme Court has stated that section 7 of the ESA "amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1979) (emphasis added, brackets omitted) (quoting 119 CONG. REC. 42913 (1973)).

However, we are of the view that the Forest Service had the authority to restrict the use of the rights of way to protect the endangered fish. The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights of way.

The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights of way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." These statutes, in our view,

give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

The FLPMA provides that "[n]othing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act," and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, *reprinted in* 43 U.S.C.A. § 1701 historical note. Under this savings clause, the government could not under the FLPMA divest a private party of an existing "land use right" or other "valid existing rights," but as described above, the plaintiffs' rights of way were always, by their written terms, revocable at the discretion of the federal government. Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right of way permits did not grant vested property rights. The 1901 Act stated that the Secretary of Interior could grant rights of way through forest reservations for ditches, but that "any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (codified at 43 U.S.C. § 959) (repealed 1976).

Appellants rely on *United States v. New Mexico*, 438 U.S. 696 (1978) ("*US v. NM*"). This case held that under a longstanding "implied-reservation-of-water doctrine," *id.* at 701, Congress did not, in enacting the Organic Administration Act and the MUSYA, intend the federal government to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. *US v. NM* did not address the power

of the Forest Service to restrict the use of rights of way over federal land. As discussed above, the FLPMA specifically authorizes the Forest Service to restrict such rights of way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law. To quote another Supreme Court case, the pending case "is not a controversy over water rights, but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917).

AFFIRMED.

Appendix D–1

FILED MAR. 14, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OKANOGAN COUNTY; EARLY WINTERS DITCH CO.; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	NO. CS-01-192-RHW
Plaintiffs,	)	**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT**
v.	)	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH & WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor, Okanogan National Forest,	)	
Defendants.	)	

Before the Court are two motions for summary judgment: Plaintiffs' Motion for Summary Judgment (Ct. Rec. 37) and Defendants' Cross-Motion for Summary Judgment (Ct. Rec. 46). The Court heard oral argument on these motions on

March 5, 2002. Galen Schuler and Thomas McDonald argued on behalf of Plaintiffs; David Gehlert and Robert Gulley argued on behalf of Defendants; John Arum argued on behalf of Defendant Intervenors. For the reasons discussed below, the Court grants summary judgment in favor of Defendants.

Overview

In the Methow River Valley in north central Washington, ranches and small communities occupy the valley floor. The surrounding land of forests and mountains is primarily owned by the federal government and managed by the United States Forest Service. Plaintiffs are landowners who access water through ditches that traverse Okanogan National Forest land. In order to construct, use, and maintain a ditch on federal land, one must obtain a special use permit from the Forest Service. The Early Winters Ditch originally was constructed, used, and maintained pursuant to a permit filed May 11, 1910. After numerous permit renewals throughout the century, the Early Winters Ditch is now used and maintained pursuant to a permit filed April 15, 1998. In 1997, the National Marine Fisheries Service had listed the steelhead trout as an endangered species; in 1998 the Fish and Wildlife Service had listed the bull trout as a threatened species. As a result, in issuing the 1998 permit, the Forest Service noted that "it may be necessary to amend this permit to include conditions which may be required by the National Marine Fisheries Service or the U.S. Fish and Wildlife Service."

The Forest Service then worked with the National Marine Fisheries Service, and the Fish and Wildlife Service, and Plaintiffs to insure that in issuing the new permit the Forest Service complied with the Endangered Species Act. The subsequent amendments added in 1999 included (among other conditions) restrictions on minimum in-stream flow rate. Plaintiffs' first and second causes of action in this lawsuit address whether the Forest Service has the authority to impose

minimum in-stream flow restrictions in a special use permit. Plaintiffs' third cause of action addresses whether Plaintiffs, in reaching the conclusion that in-stream flow conditions were necessary, applied the Endangered Species Act in an arbitrary and capricious manner. Plaintiffs' fourth cause of action addresses whether Plaintiffs violated the Administrative Procedures Act by following a rule that was not subject to notice and comment. Review is based on the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Does the Forest Service have the power?

At the outset, it is important to note that this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter. The Government has not claimed a superior water right, nor would this Court have jurisdiction if it did (determination of water rights is a question for state courts). By conditioning a special use permit, the Forest Service does not (and cannot) reserve the water from other users who do not use Forest Service land to access water. Moreover, even though Plaintiffs must comply with the special use permit, they retain their water rights and may be able to divert the water through alternate means or from an alternate diversion point. Claiming a water right is a much more powerful tool in that the in-stream flows at issue could be reserved against *all* users.

Plaintiffs argue that because Defendants do not have the power to claim a water right (see discussion below), the Forest Service is attempting to do indirectly that which it is forbidden from doing directly. However, this argument misstates the question before the Court. Defendants have opted for the much less powerful tool of conditioning a special use permit, and the only question before the Court is whether Congress intended the Forest Service to have this much less powerful tool.

Plaintiffs have argued that although they maintain their water rights, the permit restrictions rise to the level of a taking.

However, Plaintiffs have not raised a taking claim before this Court. The question before the Court is not a controversy about whether Government action constitutes a "taking" for Fifth Amendment purposes.

The question presented is one of Congressional intent regarding the Forest Service's freedom to contract: Did Congress intend that the Forest Service have the power to condition a special use permit to protect, fish by requiring minimum in-stream flows? If the Court finds that the Forest Service does not have this power, the proper remedy is to remand the special use permit to the Forest Service to establish new conditions (noting that the Forest Service would not be allowed to include minimum in-stream flows as a condition). However, the Court finds that Congress intended a broad freedom of contract in issuing special use permits, and that the special use permits at issue do not exceed the Forest Service's power.

A federal agency has all those powers that are (1) granted by statute, and (2) not relinquished through contract. The Court considers each in turn.

> Do the Organic Act and the Multiple Use and Sustained Yield Act authorize the Forest Service to condition a special use permit to protect fish by requiring minimum in-stream flows?

Before 1973, the Early Winter's special use permits were issued pursuant to 43 U.S.C. § 959 (as enacted in 1901), which provides broad permitting discretion:

> The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest and other reservations of the United States [for] canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits.

> . . . [Any] permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public lands, reservation, or park.

Id.

Defendants contend that the Organic Administration Act of 1897 (16 U.S.C. § 473-482) gives the Forest Service broad discretion to incorporate a great variety of permit restrictions, including a requirement of minimum in-stream flows. Plaintiffs contend that, while the Forest Service does have broad Organic Act discretion to incorporate a great variety of permit restrictions, this discretion does not include the right to restrict in-stream flow.

In *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court held that the United States could claim a federal reserve water right for only two purposes: "to conserve the water flows, and to furnish a continuous supply of timber for the people." *Id.* at 707 (internal quotes and citations omitted). These two primary purposes are found in the text of the Organic Act detailing the purposes for which national forests may be established and administered:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

16 U.S.C. § 475 (as enacted 1897).

Subsequent legislation expanded the purposes of the national forests. In 1960, Congress passed the Multiple Use

Sustained Yield Act, 16 U.S.C. § 528, *et seq.*, which formally recognized some secondary purposes for the national forests:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of . . . this title are declared to be supplemental to, but not in derivation of, the purposes for which the national forests were established as set forth in the [Organic Act].

In *United States v. New Mexico*, the question before the Court was whether Congress, in enacting these new purposes, intended that the new purposes could authorize a reservation of additional water. Again, the Court held that the Government could not reserve a water right for any purpose other than the two primary purposes ("to conserve the water flows, and to furnish a continuous supply of timber for the people"). However, the holding is limited to instances in which the Government is reserving a water right. With respect to the general regulatory authority, the Forest Service retains the broad Organic Act powers to achieve both the primary purposes and the secondary purposes as detailed in the Multiple Use and Sustained Yield Act.

The Forest Service contends that under the Organic Act it has always had the power to condition special use permits to include the maintenance of in-stream flows. The Court rejects this position. While the Organic Act gave broad powers to the government to regulate private uses of the forest, the exercise of that power would have to be consistent with the purposes for which the forest was administered. Restriction on a permit to require in-stream flows would not have been consistent with the purposes of the forest until at least the passage of the Multiple Use and Sustained Yield Act in 1960. While not necessary to a decision, the Court believes that such a restriction prior to the

Multiple Use and Sustained Yield Act would have been arbitrary and capricious.

However, the Multiple Use and Sustained Yield Act changed the proposes for which forests were administered and such purposes had to be considered when the agency was taking action on a permit to use the forest land. These purposes include management for fish and wildlife.

Were Defendants attempting to reserve a water right for these purposes, the holding in *United States v. New Mexico*, *supra*, would require that the Court grant summary judgment in favor of Plaintiffs. However, as discussed above, there are significant differences between "requiring minimum in-stream flows as a condition of a special use permit" and "reserving a water right."

The Court holds that under the Organic Act and Multiple Use and Sustained Yield Act, Congress intended the Forest Service to have broad powers in regulating private uses of forest land. This power includes conditioning special use permits to require minimum in-stream flows to protect fish where consistent with the forest purposes, as defined by Congress. This power was further defined and limited by Congress in the Endangered Species Act, as discussed, *infra*.

Does Subsequent Legislation Diminish Authority to Condition a Special Use Permit by Requiring Minimum In-stream Flows?

After 1976, the Early Winters special use permits were issued pursuant to the Federal Land Policy and Management Act, 43 U.S.C. § 1761-1771. Although the Federal Land Policy and Management Act is substantially more detailed than its predecessor, the details do not address whether the Forest Service may condition a special use permit by requiring minimum in-stream flows. Plaintiffs contend that the following

savings provisions limit the Forest Service power to condition special use permits:

> (a) Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act. . . .
>
> . . .
>
> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—
>
> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
>
> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; . . .
>
> . . .
>
> (4) as superseding, modifying, or repealing, except as, specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;
> . . .
>
> . . .
>
> (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701, Historical Note.

The Court reads this statutory language as showing an intent to preserve the status quo with respect to federal and state jurisdiction over the use of water on federal land. Specifically, (1) existing special use permits will remain valid until their expiration dates; (2) existing water laws are unaffected; (3) existing jurisdiction and federal rights are unaffected; (4) existing agency powers are unaffected; and (5) existing rights are unaffected. Therefore, if the Forest Service had the power to impose minimum in-stream flow restrictions in a special use permit, the Forest Service retains this power. If, however, the Forest Service was attempting to claim a water right or exercise a power not authorized under its authority, the Federal Land Policy and Management Act would prohibit the action. As discussed above, the Court finds that the Forest Service is not attempting to claim a water right, and the Forest Service is authorized to impose minimum in-stream flow restrictions in a special use permit. The Federal Land Policy and Management Act does not diminish this power.

Plaintiffs also maintain that the Alaska National Interest Lands Conservation Act (16 U.S.C. § 3102, *et. seq.*) diminishes the authority of the Forest Service. The statute reads:

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof.

16 U.S.C. § 3210(a).

Although water is included in the definition of lands under the Act, this provision does not create a right to transmit and distribute water across federal land. Specifically, "access" is defined as "the ability of landowners to have ingress and egress to their lands," and "does not include right-of-way for power

lines or other utilities." 36 C.F.R. § 251.111. Moreover, even if 16 U.S.C. § 3210(a) were applicable, a plaintiff seeking judicial confirmation of a right of access under that provision would bear the burden of applying to the administrative agency for such a right and the agency's action would be constrained by the Endangered Species Act, as discussed *infra*.

Finally, Plaintiffs maintain that the 1986 amendment to the Federal Land Policy and Management Act (the "Ditch Bill") diminishes the Organic Act authority of the Forest Service. Plaintiffs cite the following passage:

> Nothing in this bill is intended to establish a basis for federal decisions affecting the timing of water delivery or the amount of water to be released through a water conveyance system. . . . the Committee intended to avoid any implication that a federal land manager was to be given, *through this legislation*, authority to regulate such matters as in-stream flows or the appropriation, use or diversion of water. . . .

House Report on 1986 "Ditch Bill" Amendment to FLPMA 43 U.S.C. § 1761(c)(3)(B) (1986 U.S.C.C.A.N. 5086, 5089) (emphasis added). The cited language makes clear that the legislation does not intend to expand the authority of the Forest Service, but makes no indication whatsoever of an intent to limit previously authorized powers of the Forest Service.

> Did the Forest Service relinquish its power through contract?

Even if the Forest Service had the power to condition a special use permit by requiring minimum in-stream flows, the Court must also determine whether the Forest Service relinquished this power through contract.

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995), tells the story of a federal agency that relinquished a power through

contract. In that case, Woolley (a private logging company) wanted to construct a logging road on land controlled by the Bureau of Land Management. In deciding the terms of a contract with a private party, the Bureau of Land Management (like the Forest Service) presumably could require any terms consistent with the Bureau of Land Management's statutory mission. In 1962, Woolley and the Bureau of Land Management decided on the following agreement:

> Construction may be commenced after the expiration of a thirty (30) day period following the filing of such map unless in the intervening period the landowner may object to such construction. The landowner may object to the proposed construction only if (1) it does not constitute the most reasonably direct route for the removal of forest products from the lands of the road builder, taking into account the topography of the area, the cost of road construction in the safety of use of such road, (2) the proposed road will substantially interfere with existing or planned facilities or improvements on the lands of the landowner, or (3) would result in excessive erosion to lands of the landowner.

Id. at 1506.

In 1973, the statutory purpose of the Bureau of Land Management changed. The question in *Sierra Club* was, given the new statutory purpose, could the landowner object to the proposed construction because (4) a listed species would be affected? The Ninth Circuit answered that the Bureau of Land Management was bound by the terms of the contract, and that "these three factors are the only conditions the BLM properly could consider." *Id.* at 1511. In other words, although the Bureau of Land Management initially had the power to condition the construction on *any terms consistent with its*

statutory mission, once it entered into the contract, it limited its power to object to the three specifically listed conditions.

Babbitt is easily distinguishable from the case before the Court. First, *Babbitt* deals with a one-time contract, with no indication of expiration or need for renewal. Thus, the agency in *Babbitt* had no further action to take (indeed, one party in the case maintained that Section 7 did not apply precisely because Bureau of Land Management's conduct was inaction). Early Winters deals with a contract that expires and is subject to renewal. Renewal and modification of the contract (as expressly anticipated by the terms of the previous contract) qualifies as an "action" that triggers Section 7 review. With the expiration of the prior permit, the Forest Service begins anew to negotiate the renewal permit, and is not bound by any language of the prior permit.

Second, the language of the contract in *Babbitt* narrowly confined the circumstances in which the landowner can object to the construction. In Early Winters, the language of the contract is much more broad. Specifically, every permit issued by the Forest Service in this case gives the Forest Service broad discretion to revoke a permit.

The 1998 special use permit provides that the Forest Service can revoke the permit (object to the right-of-way) for:

> (1) Noncompliance with Federal, State, or local laws and regulations.
>
> (2) Noncompliance with the terms and conditions of this permit.
>
> (3) Reasons in the public interest.
>
> (4) Abandonment or other failure of the holder to otherwise exercise the privileges granted.

EW 265.

The Court finds that the Forest Service has the power to condition a special tree permit by requiring minimum in-stream flows, and that the Forest Service did not relinquish this power through contract.

Violation of the Endangered Species Act (Third Cause of Action)

Having found that the Forest Service has the power to impose minimum in-stream flow restrictions in a special use permit, the Court now turns to the question of whether Defendants properly exercised this power. Specifically, the Court addresses the question of whether the Endangered Species Act requires the Forest Service to impose the minimum in-stream flow restrictions at issue in this case. Under the Administrative Procedures Act, administrative agency action should be set aside if it is arbitrary and capricious, or an abuse of discretion, or not in accordance with the law. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995).

Standing

The parties agree that Plaintiff Early Winters has standing as to the first, second, and fourth causes of action, and that the Court need not determine the other Plaintiffs' standing to bring those claims so long as Early Winters remains in the case. The parties agree that Plaintiff Early Winters has standing on the portion of the third cause of action pertaining to the Early Winters special use permit and biological opinion. However, the Court must determine whether any Plaintiff has standing on the portion of the third cause of action pertaining to the Skyline special use permit and biological opinion. For the reasons discussed below, the Court finds that no Plaintiff in this case has standing to request review of whether Defendants violated; the Endangered Species Act in the process of issuing the Skyline special use permit and biological opinion.

David Jones and Frances Kaul own approximately 10 acres of land and appurtenant water rights that are served by the Skyline irrigation ditch. They also own shares in the Skyline Ditch Company, the holder of one of the special use permits at issue in this case. Although the Skyline Ditch Company decided not to participate in this lawsuit, Plaintiffs argue that Jones and Kaul have standing because Defendants' action is a regulation of water rights owned by Jones and Kaul. As noted above, this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter. Plaintiffs have requested injunctive relief, that the Court prohibit the Government from enforcing the Skyline Ditch special use permit. Jones and Kaul have no standing to demand a changed the conditions of the Skyline special use permit (a permit held by Skyline Ditch Company, not a party before the Court).

Plaintiffs argue that Okanogan County has standing because, in planning for water policy, Okanogan County works closely with (and depends on the decisions of) the federal agencies involved in this case. This relationship does not rise to the "concrete and particularized" interest required to establish standing. If Okanogan County owned property that would be affected by the special use permit, it may have been able to establish standing. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995); *Churchill County v. Babbitt*, 150 F.3d 1072, 1079 (9th Cir. 1998); *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996). However, Okanogan County has not shown that it owns property that would be directly and greatly affected by the proposed action.

Endangered Species Act Overview

In this matter, the Forest Service claims that the Endangered Species Act requires the Forest Service to exercise its power in imposing the minimum in-stream flow restrictions

on the Early Winters special use permit. The Endangered Species Act, enacted in 1973, provides in relevant part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .

16 U.S.C. § 1536. In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Supreme Court detailed the impact of the Endangered Species Act on the purposes of all federal agencies. The Endangered Species Act fundamentally changed the purpose of every federal agency:

> Section 7 substantially amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of this act. . . . The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. The agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

Id., at 183-84.

Note, however, that while the Endangered Species Act does fundamentally affect the purpose of every federal agency, the Endangered Species Act does not enlarge the powers of the agencies. Rather, each agency must take steps "within their power" to carry out the additional purposes. "[T]he statute directs agencies to 'utilize their authorities' to carry out the Endangered Species Act's objectives; it does not *expand* the

powers conferred on an agency by its enabling act." *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *American Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998).

Here, the flow-rate conditions do not represent an addition of Forest Service power but, rather, a contraction. Before passage of the Endangered Species Act, the Forest Service had broad discretion in formulating conditions for special use permits—it could issue permits that would adversely affect endangered species. After passage of the Endangered Species Act, the Forest Service no longer has broad discretion—it no longer may issue permits that will adversely affect endangered species. Rather than expanding the power, the Endangered Species Act qualifies the scope of the existing power.

Moreover, as discussed above, the Organic Act and Multiple Use and Sustained Yield Act empower the Forest Service to impose minimum in-stream flow restrictions in a special use permit to protect fish. In complying with the Endangered Species Act, the Forest Service is not exercising a new power but, rather, considering a new factor (effects on endangered species) when exercising given powers.

Specific Objections

(1) Plaintiffs argue that because Defendants have no discretion to condition a special use permit by requiring minimum in-stream flows, Defendants have no basis for consultation on in-stream flows. Having ruled that Defendants do have discretion to condition a special use permit by requiring minimum in-stream flows (see above), the Court finds that Section 7 consultation was properly triggered.

(2) Plaintiffs argue that the environmental baseline used for establishing the Early Winters Biological Opinion must include the impact of the current special use permit and use of existing water rights. The environmental baseline "includes the

past and present impacts of Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress." 50 C.F.R. § 402.02. Given that baseline, the agency must determine the impact of the current action (here, permit renewal). When consulting about the effects of a renewal permit relative to the environmental baseline, it is nonsensical to include that same renewal permit in the baseline. At very least, Defendants did not abuse their discretion in determining the relevant baseline.

(3) Plaintiffs argue that 50 C.F.R. § 402.14(g)(4) is invalid, as it requires the agency to consider cumulative effects, specifically the effects of other existing water users (whose rights may be junior to Plaintiffs) and anticipated newcomers. Once Section 7 triggers consultation, the agency must evaluate all the effects of reissuing the special use permit, even if the agency does not have control over some effects. Although Defendants do not have control over all water users that that effect the steelhead trout and bull trout, Defendants are charged with the responsibility of making sure that the powers they do have (including the power to issue special use permits) are not utilized to have an adverse effect on the protected animals.

(4) Plaintiffs argue that Defendants have abused their discretion in equating the "jeopardy" standard (a standard dealing with the survival of the species) with the "properly functioning conditions" or "recovery" standard (a higher standard dealing with the recovery of a species). The Court finds that the administrative record supports a finding that, at least for the specific situation of the fish at issue in this case, the actions that would ensure the species survival might be the same (or at least are an important factor to consider) as those needed to achieve recovery. This is not to say that "recovery" is always equal to "survival" but, rather, simply that in this

case, for these fish, on this administrative record, it was not an abuse of discretion for the Defendants to so find.

(5) Plaintiffs argue that the National Marine Fisheries Service and Fish and Wildlife Service should have deferred to the Forest Service's "no authority" contention. The Court agrees that before issuing a special use permit, the Forest Service (and not the National Marine Fisheries Service and Fish and Wildlife Service) ultimately must determine whether the Forest Service has proper authority to include conditions in the permit. There is no indication that the National Marine Fisheries Service and Fish and Wildlife Service have forced the Forest Service to include the conditions in the permit.

Violation of the Administrative Procedures Act (Fourth Cause of Action)

The Court finds that these defendants did not abuse their discretion in their efforts to comply with the Endangered Species Act.

Under the Administrative Procedures Act (APA), administrative agency action should be set aside if it is arbitrary and capricious, or an abuse of discretion, or not in accordance with the law. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995).

Before engaging in "rule-making," an agency must provide the public notice and an opportunity to comment. The parties agree that National Marine Fisheries Service uses the "Habitat Approach" for Endangered Species Act consultation, and the public has been afforded neither public notice nor opportunity to comment. The question for the Court, then, is this: Is the "Habitat Approach" a rule? Case law suggests that the "Habitat Approach" is a rule if (1) it is controlling, (2) the agency treats it like a rule, (3) the agency leads applicants to believe that it is a rule, or (4) enforcement of agency policy is based on it. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021. In

determining whether the "Habitat Approach" is a rule, the critical factor is "the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987).

Here, Defendants have provided three examples in which the National Marine Fisheries Service staff exercised the "discretion to dispense with this analytic tool altogether." *See* Defendants' Reply Memorandum, p. 13. The Court finds that the "Habitat Approach" is not a role, and is not subject to the notice and comment requirements of the APA.

CONCLUSION

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment (Ct. Rec. 37) is **DENIED**.

2. Defendants' Cross-Motion for Summary Judgment (Ct. Rec. 46) is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 13 day of March 2002.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

Appendix E–1

16 USCA § 475
16 U.S.C.A. § 475

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 2—NATIONAL FORESTS
SUBCHAPTER I—ESTABLISHMENT
AND ADMINISTRATION

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Appendix F–1

16 USCA § 528
16 U.S.C.A. § 528

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 2—NATIONAL FORESTS
SUBCHAPTER I—ESTABLISHMENT
AND ADMINISTRATION

§ 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

Appendix G–1

43 USCA § 1701
43 U.S.C.A. § 1701

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35—FEDERAL LAND
POLICY AND MANAGEMENT
SUBCHAPTER I—GENERAL PROVISIONS

§ 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the

Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

* * *

HISTORICAL AND STATUTORY NOTES

* * *

Savings Provisions

Section 701 of Pub.L. 94-579 provided that:

"**(a)** Nothing in this Act [see Short Title note under this section], or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].

* * *

"**(f)** Nothing in this Act shall be deemed to repeal any existing law by implication.

"**(g)** Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

"**(1)** as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

"**(2)** as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

* * *

"**(h)** All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

* * *

43 USCA § 1761
43 U.S.C.A. § 1761

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35—FEDERAL LAND
POLICY AND MANAGEMENT
SUBCHAPTER V—RIGHTS-OF-WAY

§ 1761. Grant, issue, or renewal of rights-of-way

(a) Authorized purposes

The Secretary, with respect to the public lands (including public lands, as defined in section 1702(e) of this title, which are reserved from entry pursuant to section 24 of the Federal Power Act (16 U.S.C. 818)) and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for—

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

(c) Permanent easement for water systems; issuance, preconditions, etc.

(1) Upon receipt of a written application pursuant to paragraph (2) of this subsection from an applicant meeting the requirements of this subsection, the Secretary of Agriculture shall issue a permanent easement, without a requirement for reimbursement, for a water system as described in subsection (a)(1) of this section, traversing Federal lands within the National Forest System ("National Forest Lands"), constructed and in operation or placed into operation prior to October 21, 1976, if—

(A) the traversed National Forest lands are in a State where the appropriation doctrine governs the ownership of water rights;

(B) at the time of submission of the application the water system is used solely for agricultural irrigation or livestock watering purposes;

(C) the use served by the water system is not located solely on Federal lands;

(D) the originally constructed facilities comprising such system have been in substantially continuous operation without abandonment;

(E) the applicant has a valid existing right, established under applicable State law, for water to be conveyed by the water system;

(F) a recordable survey and other information concerning the location and characteristics of the system as

necessary for proper management of National Forest lands is provided to the Secretary of Agriculture by the applicant for the easement; and

(G) the applicant submits such application on or before December 31, 1996.

(2)(A) Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

(B) Easements issued under the authority of this subsection shall be fully transferable with all existing conditions and without the imposition of fees or new conditions or stipulations at the time of transfer. The holder shall notify the Secretary of Agriculture within sixty days of any address change of the holder or change in ownership of the facilities.

(C) Easements issued under the authority of this subsection shall include all changes or modifications to the original facilities in existence as of October 21, 1976, the date of enactment of this Act.

(D) Any future extension or enlargement of facilities after October 21, 1976, shall require the issuance of a separate authorization, not authorized under this subsection.

(3)(A) Except as otherwise provided in this subsection, the Secretary of Agriculture may terminate or suspend an easement issued pursuant to this subsection in accordance with the procedural and other provisions of section

1766 of this title. An easement issued pursuant to this subsection shall terminate if the water system for which such easement was issued is used for any purpose other than agricultural irrigation or livestock watering use. For purposes of subparagraph (D) of paragraph (1) of this subsection, non-use of a water system for agricultural irrigation or livestock watering purposes for any continuous five-year period shall constitute a rebuttable presumption of abandonment of the facilities comprising such system.

(B) Nothing in this subsection shall be deemed to be an assertion by the United States of any right or claim with regard to the reservation, acquisition, or use of water. Nothing in this subsection shall be deemed to confer on the Secretary of Agriculture any power or authority to regulate or control in any manner the appropriation, diversion, or use of water for any purpose (nor to diminish any such power or authority of such Secretary under applicable law) or to require the conveyance or transfer to the United States of any right or claim to the appropriation, diversion, or use of water.

(C) Except as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of this Act.

(D) In the event a right-of-way issued pursuant to this subsection is allowed to deteriorate to the point of threatening persons or property and the holder of the right-of-way, after consultation with the Secretary of Agriculture, refuses to perform the repair and maintenance necessary to remove the threat to persons or property, the Secretary shall have the right to undertake such repair and maintenance on the right-of-way and to assess the holder for the costs of such repair and maintenance, regardless of whether the Secretary had required the holder to furnish a bond or other security pursuant to subsection (i) of this section.

* * *

Appendix H–1

16 USCA § 1536
16 U.S.C.A. § 1536

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 35—ENDANGERED SPECIES

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * *

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

* * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title; the

Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * *

Appendix I–1

16 USCA § 1538
16 U.S.C.A. § 1538

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 35—ENDANGERED SPECIES

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * *

(3)

No. 03-1071

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

and

WASHINGTON ENVIRONMENTAL COUNCIL, OKANOGAN WILDERNESS LEAGUE, CENTER FOR ENVIRONMENTAL LAW & POLICY, DEFENDERS OF WILDLIFE, TROUT UNLIMITED, and AMERICAN RIVERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT WASHINGTON ENVIRONMENTAL COUNCIL'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Forest Service have discretionary authority under the Federal Land Policy and Management Act and other applicable law to condition the renewal of a revocable right-of-way for an irrigation ditch occupying National Forest lands on minimum stream flow requirements needed to ensure the survival and recovery of endangered fish species within the National Forest, where the permit applicant has no easement or other vested right to use National Forest land?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law & Policy, Defenders of Wildlife, Trout Unlimited, and American Rivers, non-profit corporations organized under the laws of Washington, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	1
A. Introduction	1
B. Statutory Background	3
1. Pre-FLPMA Right-of-Way Statutes	3
2. Federal Land Policy and Management Act	4
3. Endangered Species Act	5
C. Factual Background	8
D. Proceedings Below	13
REASONS FOR DENYING THE PETITION	14
A. The Decision in This Case Does Not Conflict With Any Circuit or Supreme Court Decision	16
B. This Case Does Not Present an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court	21
C. The Court of Appeals Decision Raises No Federalism Concerns	24
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States, 3 F.3d 1254 (9th Cir. 1993) 22

Bennett v. Spear, 520 U.S. 154 (1997) 6, 8

Camfield v. United States, 167 U.S. 518 (1897) 17

Cappaert v. United States, 426 U.S. 128 (1976) 16

City and County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982) 19

Federal Power Commission v. Oregon, 349 U.S. 435 (1955) 3, 22

Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981) 5

Hage v. United States, 51 Fed. Cl. 570 (2002) 22

Hallauer v. Spectrum Props., 143 Wn.2d 126, 18 P.3d 540 (2001) 19

Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) 22

Kern River Co. v. United States, 257 U.S. 147 (1921) 3, 4

Kleppe v. New Mexico, 426 U.S. 529 (1976) 17

National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976) 23

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 22

Public Lands Council v. Babbitt, 529 U.S. 728 (2000) 22

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TABLE OF AUTHORITIES – Continued

Page

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 24

Snyder v. Colorado Gold Dredging Co., 181 F. 62 (8th Cir. 1910) 19

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 6

United States v. Jenks, 22 F.3d 1513 (10th Cir. 1994) 4

United States v. McIntire, 101 F.2d 650 (9th Cir. 1939) 3, 22

United States v. New Mexico, 438 U.S. 696 (1978) ..... *passim*

Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) ..... *passim*

STATUTES

U.S. Const. Art. IV, Sec. 3 17

16 U.S.C. § 475 ..... 13, 14

16 U.S.C. § 495 17

16 U.S.C. § 528 ..... 13, 17, 23

16 U.S.C. § 1533 5

16 U.S.C. § 1536 ..... *passim*

16 U.S.C. § 1604(g)(3) 14, 23

43 U.S.C. § 661 ..... 3, 22

43 U.S.C. § 959 ..... 1, 3, 4, 22

43 U.S.C. §§ 1701 *et seq* 1

TABLE OF AUTHORITIES – Continued

Page

43 U.S.C.A. § 1701, Historical Note (FLPMA § 701(a)) 5

43 U.S.C. § 1701(a)(8) 4

43 U.S.C. §§ 1761-71 4

43 U.S.C. § 1761(a)(1) 5, 20

43 U.S.C. § 1761(c)(1) 26

43 U.S.C. § 1765 ..... 1, 2, 23

43 U.S.C. § 1765(a) 13, 20

43 U.S.C. § 1765(a)(ii) 5

43 U.S.C. § 1765(a)(iii) 5

Pub. L. 99-545, 100 Stat. 3047 (Oct. 27, 1986) 26

29 Stat. 904 (Feb. 22, 1897) 8

REGULATIONS

50 C.F.R. § 402.02 ..... 7, 8

50 C.F.R. § 402.03 ..... 7, 23

50 C.F.R. § 402.14(a) 7

50 C.F.R. § 402.14(h)(3) 7

50 C.F.R. § 404.02 24

MISCELLANEOUS

62 Fed. Reg. 43,937 (Aug. 18, 1997) 10

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TABLE OF AUTHORITIES – Continued

Page

P. Fleming, *Vested Pre-FLPMA Rights of Way for Water Conveyance Facilities*, COLORADO LAWYER 83-85 (Feb. 1996) 3

Solicitor's Opinion, Death Valley National Monument – Appropriation of Water, 55 Interior Dec. 371 (Oct. 22, 1935) 25

Solicitor's Opinion – Rights-of-Way for Ditches and Canals, 58 Interior Dec. 29 (1942) 3

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife, Respondents below, file this opposition to the Petition for Writ of Certiorari of Petitioners County of Okanogan, Early Winters Ditch Company, Inc., David C. Jones, and Frances A. Kaul.

STATUTORY PROVISIONS AT ISSUE

The Act of February 15, 1901 (1901 Act) is found at 43 U.S.C. § 959 and is set out in full in Appendix A to this Brief.

The Federal Land Policy and Management Act (FLPMA) is found at 43 U.S.C. §§ 1701 *et seq.* One relevant provision of FLPMA which is not set out in Petitioners' Appendix, 43 U.S.C. § 1765, is set out in Appendix B to this Brief.

Section 7 of the Endangered Species Act (Section 7) is found at 16 U.S.C. § 1536 and is set out in Petitioners' Appendix H.

STATEMENT OF THE CASE

A. Introduction.

This case involves the Forest Service's exercise of its long-established power to condition the renewal of a revocable special use permit for an irrigation ditch right-of-way

across National Forest lands. The court of appeals correctly held that the Forest Service has the power to condition the renewal of such a permit for the use of its land on operational restrictions necessary to ensure the survival of endangered chinook salmon and steelhead trout.

There is nothing remarkable about the lower court's decision. Under Section 505 of FLPMA, 43 U.S.C. § 1765, the Forest Service must include in a revocable permit for a ditch right-of-way conditions to protect fish and wildlife habitat and water quality. Other Federal statutes likewise authorize the Forest Service to preserve fish and wildlife within the National Forest system. Because the Forest Service has the discretion under FLPMA and other federal land management statutes to decide whether and upon what conditions to issue a right-of-way permit, it has an obligation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, to consult with the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) over the effects the permit would have on endangered fish populations on and off National Forest lands and to ensure that renewal of the permit will not jeopardize these species.

The Forest Service's exercise of its authority to condition a revocable permit for the use of its land does not threaten, let alone assert, federal control over state water rights as Petitioners claim.

For these reasons, as further explained below, the Court should deny the petition.

B. Statutory Background.

1. Pre-FLPMA Right-of-Way Statutes.

Before Congress enacted FLPMA in 1976, two important statutes authorized grants of rights-of-way for irrigation ditches on Federal lands: the Mining Act of July 26, 1866, 43 U.S.C. § 661, and the Act of February 15, 1901, 43 U.S.C. § 959. *See Solicitor's Opinion – Rights-of-Way for Ditches and Canals*, 58 Interior Dec. 29 (1942); P. Fleming, *Vested Pre-FLPMA Rights of Way for Water Conveyance Facilities*, COLORADO LAWYER 83-85 (Feb. 1996).

Under the 1866 Mining Act, a water user could obtain a right-of-way across the public domain simply by acquiring a water right under local law and constructing a diversion system on public land. No application, filing, or approval by the Federal government was required. 43 U.S.C. § 661. The 1866 Act has been construed as creating a limited fee or easement that can be terminated only in an appropriate judicial proceeding authorized by law. *Kern River Co. v. United States*, 257 U.S. 147, 151-52 (1921). Significantly, however, the 1866 Mining Act did *not* apply to forest reserves or federal lands that had been reserved from the public domain *before* the water right vested under local law. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 447-48 (1955); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

In contrast to the 1866 Act, the 1901 Act authorized the Secretary of the Interior to issue a right-of-way *permit* for irrigation ditches on *all* federal lands, including forest reserves. 43 U.S.C. § 959. However, the 1901 Act provided that:

> [A]ny permission given by the Secretary of the Interior under the provisions of this section may

> be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement or interest in, to, or over any public land, reservation or park.

Id. (emphasis added). As a consequence of this language, a right-of-way permit granted under the 1901 Act provided no more than a "revocable license." *Kern River*, 257 U.S. at 152. Congress gave federal land managers broad discretion to decide whether and on what conditions to issue a revocable permit under the 1901 Act:

> [S]uch permits shall be allowed within or through . . . any forest . . . *only* upon the approval of the chief officer of the Department under whose supervision such . . . reservation falls and *upon a finding by him that the same is not incompatible with the public interest.*

43 U.S.C. § 959 (emphasis added).

2. Federal Land Policy and Management Act.

Congress enacted FLPMA in 1976 to establish a policy that Federal lands would be managed in a manner which would protect the quality of "scientific, scenic, historical, ecological, environmental, air and atmosphere, water resource, and archeological values" and "provide food and habitat for fish and wildlife." 43 U.S.C. § 1701(a)(8). FLPMA repealed the "tangled array of laws granting rights-of-way across Federal lands" and replaced these statutes with a more comprehensive and detailed statutory scheme, 43 U.S.C. §§ 1761-71. *See United States v. Jenks*, 22 F.3d 1513, 1515 (10th Cir. 1994).

FLPMA authorizes Federal land managers to "grant, issue or renew rights-of-way" for "ditches . . . and other

facilities and systems for the . . . transportation, or distribution of water." 43 U.S.C. § 1761(a)(1). However, under FLPMA, such rights-of-way may not unduly compromise the protection of fish and wildlife habitat. Section 505 of FLPMA provides that rights-of-way *must* contain terms and conditions which will "minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a)(ii), (iii). Although Congress repealed prior right-of-way statutes, it included a savings clause which provides that nothing in FLPMA "shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of [the] Act." FLPMA, § 701(a), *reprinted in* Historical Note to 43 U.S.C.A. § 1701; *see also* FLPMA, § 701(h), *reprinted in* Historical Note to 43 U.S.C.A. § 1701 (administrative actions under FLPMA shall be "subject to valid existing rights"). Thus, right-of-way permits and easements issued under earlier statutes remained in effect after the passage of FLPMA, subject to the terms of those prior statutes. *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 101, n.2 (9th Cir. 1981).

3. Endangered Species Act.

The Endangered Species Act (ESA) protects species that have been listed as "endangered" or "threatened" under Section 4 of the Act, 16 U.S.C. § 1533. Section 7 of the ESA requires that Federal agencies:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter

> in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

16 U.S.C. § 1536(a)(2). The language of Section 7 "admits of no exception." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). While Section 7 does not expand the powers of Federal agencies, it requires that agencies utilize their existing authorities in conformance with the mandates of the ESA:

> Section 7 substantially amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of this act. . . . The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of the government is committed to see that those purposes are carried out. The agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

Id. at 183-84.

To assist Federal agencies in complying with their Section 7 obligations, the ESA mandates an interagency consultation process designed to avoid actions which may jeopardize the survival of listed species or cause the destruction or adverse modification of their designated critical habitat. *See generally Bennett v. Spear*, 520 U.S. 154, 158 (1997). Under this process, a Federal agency proposing an "action" that "may affect" a listed species (the "action agency") must consult with NMFS or FWS (the "consulting agency") over the effects of the action on listed species

before the action may proceed. 16 U.S.C. § 1536(a)(2). The duty to consult applies to all actions, including on-going actions, in which there is "discretionary federal involvement or control" including "the granting of licenses, contracts, leases, easement, *rights-of-way*, *permits* or grants in aid . . . " 50 C.F.R. §§ 402.02, 402.03 (emphasis added). Consultation must include both the "direct and indirect effects" of the action on the species "together with the effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 404.02.

In the first step of the consultation process, the action agency usually prepares and submits to NMFS or FWS a "biological assessment" analyzing the effect of the proposed action on the listed species. 50 C.F.R. § 402.14(a). For those actions that may adversely affect a species, the consulting agency must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a "biological opinion." *Id.*; 16 U.S.C. § 1536(b)(3)(A).

If the consulting agency concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, it must identify and describe any "reasonable and prudent alternative" to the proposed action that it believes would avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(B). A "reasonable and prudent alternative" may only consist of measures that are within the scope of the action agency's legal authority and jurisdiction, that can be implemented consistent with the purpose of the proposed action, and that will avoid

jeopardizing the continued existence of the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02.

Although an action agency is not strictly bound by the terms of a biological opinion because each action agency "has an independent duty" to prevent jeopardy to a listed species, its issuance nevertheless "alters the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 169. An action agency often has little expertise in biological and ecological matters, and should it choose to proceed outside the terms of a biological opinion, it does so "at its own peril[.]" *Id.* at 170.

C. Factual Background.

The Washington Forest Reserve, the predecessor of the Okanogan National Forest, was reserved from the public domain on February 22, 1897. *See* 29 Stat. 904; App. A-3. *Five years later*, the founders of the Skyline Ditch Company began their efforts to appropriate water. Water users on Early Winters Creek began their efforts several years after that.[1] App. A-3 and A-4. In addition to taking steps to appropriate water under State law, both groups sought permission from the Federal government to construct ditches across National Forest land to convey water to their properties. *Id.*

In 1903, the Skyline Ditch Company ("Skyline") applied to the Secretary of the Interior for a "permit to . . . [c]onstruct and maintain a water ditch for irrigation,

[1] Petitioners incorrectly assert that the irrigation ditches were constructed on "unreserved" public land. *See* Petition at 3.

domestic use and power purposes . . . [t]o be located upon the Washington Forest Reserve" on the Chewuch River. App A-3; Administrative Record ("AR") at SKY 4. The Secretary granted Skyline's permit application, subject to a "Special Privileges" contract which stated:

> It is further agreed and understood that the permission herein granted is subject to revocation by the Secretary of the Interior, *in his discretion, at any time,* notwithstanding the period for which this agreement is approved may not have then expired.

App A-3; AR at SKY 51 (emphasis added). A special use permit was issued by the Secretary which stated on its face: "Terminable at the discretion of the Forester of the U.S. Department of Agriculture." App. A-3; AR at SKY 54.

In 1971, the Forest Service reissued Skyline a "revocable and nontransferable" special use permit, which provided that the permit could be "terminated . . . at the discretion of the regional forester or the Chief, Forest Service." App. A-3 to A-4; AR at SKY 114-16. The permit included a fixed expiration date and provided for renewal only if the permittee "complies with the *then-existing* laws and regulations governing the occupancy and use of National Forest Lands." App. A-4; AR at SKY 116 (emphasis added). The permit "confer[red] no right to the use of water by the permittee." AR at SKY 116.

In 1909, Harry Briggs and others filed a notice with the State of Washington of their intent to establish a water right on Early Winters Creek and applied to the Forest Service for a special use permit allowing the construction of a ditch on Forest Service lands. App. A-4; AR at EW 12. In 1910, the Forest Service issued Briggs a special use

permit for the Early Winters Ditch which required the permittee to "comply with all laws and regulations governing National Forests" and provided that the permit would "terminate . . . at the discretion of the Forester." App. A-4; AR at EW 28. The 1910 permit was renewed several times. App. A-4. All of these permits required compliance with Forest Service regulations, were expressly terminable at the discretion of the Forest Service, and "confer[red] upon the permittee no right to use the water involved." App. A-4. Beginning in 1971, the Early Winters permits included a fixed expiration date and provided for renewal only if the permittee "complies with the *then-existing* laws and regulations governing the use and occupancy of National Forest lands." App. A-4 (emphasis added). All subsequent permits for both ditches stated that new permits would be issued "in the absolute discretion of the Forest Service," that the permits could be amended at the discretion of the Forest Service to incorporate new terms required by law, and the permit holders would comply with all applicable federal laws, including "relevant environmental laws." App. A-4.

In 1996, the Forest Service notified the permittees that their special use permits would expire at the end of that year and warned: "it is important that you understand that your [special use permit] will not be automatically renewed." AR at SKY 248, EW 198.

In 1997 NMFS listed Columbia River steelhead trout (*Oncorhynchus mykiss*) as an "endangered" species in accordance with section 4 of the ESA. 62 Fed. Reg. 43,937 (Aug. 18, 1997). Two years later, in 1999, NMFS listed Upper Columbia River spring-run chinook salmon (*Oncorhynchus tshawytscha*) as "endangered." 64 Fed. Reg. 14,308 (Mar. 24, 1999). Both of these species still inhabit

streams on the Okanogan National Forest, including the Methow River and its tributaries, Early Winters Creek and the Chewuch River. AR at EW 333, SKY 286-87. Steelhead trout and chinook salmon use these streams for spawning, rearing, and migration. *Id.* The level of water flowing in these streams affect the survival of these migratory or anadromous species. App. A-6.

In 1998, the Forest Service issued revised special use permits which were subject to amendment based on the consultation process required under Section 7 of the ESA to protect endangered steelhead trout and chinook salmon. App. A-5; AR at SKY 372, EW 271. As required by Section 7, the Forest Service then prepared biological assessments for the special use permits. App. A-5 and A-6. The biological assessments found that the Skyline Ditch was one of the two largest water diversions on the Chewuch River and that its fish screen was ineffective in protecting steelhead trout. App. A-5; AR at SKY 318. The Forest Service also found that operation of the Early Winters Ditch could dewater steelhead nests and reduce the spawning and rearing habitat available for steelhead trout and chinook salmon. App. A-5 and A-6; AR at EW 333. The Forest Service concluded that the continued use of National Forest lands for the operation of both ditches was "likely to adversely affect" endangered steelhead trout and chinook salmon. App. A-5 and A-6; AR at SKY 341, EW 334.

In accordance with Section 7 of the ESA, the Forest Service then initiated formal consultation with NMFS over the effects that operation of the two ditches would have on endangered steelhead trout and chinook salmon. App. A-6.

Two years later, NMFS issued biological opinions for renewal of the rights-of-way for the two ditches. *Id.* According to the biological opinions, operation of the Early Winters Ditch was "*not* likely to jeopardize the continued existence of Upper Columbia River steelhead or Upper Columbia River chinook salmon, or result in the destruction or adverse modification of designated critical habitat," provided the ditch was operated in accordance with a plan of operations agreed to by the Forest Service and the Early Winters Ditch Company. *Id.* This plan called for use of deep-water wells, instead of surface diversions from Early Winters Creek, to supply irrigation water under the Ditch Company and its members' state water rights during low flow conditions in Early Winters Creek and the Methow River immediately downstream. *Id.* This limitation in the renewed permit would help maintain instream flows needed to avoid jeopardy or adverse modification of critical habitat. *Id.*; AR at EW 1200 (emphasis added). By contrast, NMFS concluded that renewal of the permit for operation of the Skyline Ditch *was* "likely to jeopardize the continued existence of both steelhead and spring chinook salmon and result in the destruction or adverse modification of designated critical habitat." App. A-6. NMFS therefore proposed a reasonable and prudent alternative recommending that renewal of the permit for operation of the ditch include conditions limiting water flows in the ditch if necessary to maintain certain instream flows in the Chewuch River downstream of the ditch diversion. *Id.*; AR at SKY 930. The Forest Service subsequently inserted this recommended condition into the new Skyline permit. AR at SKY 1205.

D. Proceedings Below.

Petitioners filed an action for declaratory and injunctive relief against several federal agencies in the United States District Court for the Eastern District of Washington. Respondent conservation groups were permitted to intervene as defendants. The district court granted summary judgment in favor of the defendants. App. D-2. The court's opinion stressed that the case did not present "a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter." *Id.* at D-3. The court held that the Organic Administration Act, 16 U.S.C. § 475, and the Multiple-Use Sustained-Yield Act ("MUSYA"), 16 U.S.C. § 528, granted the Forest Service authority to include a minimum flow condition in a revocable special use permit where necessary to protect fish habitat. *Id.* at D-7. The court concluded that this authority was not diminished by FLPMA or any other subsequent enactment. *Id.* at D-7 to D-10. Based on the Forest Service's broad permitting authority over the rights-of-way in question, the district court held that the renewal of the special use permits was a discretionary action that was subject to the consultation requirements of Section 7 of the ESA. *Id.* at D-16.

The court of appeals affirmed. The court held that although the ESA does not grant agencies new powers, the Forest Service already had the authority to condition the use of revocable federal rights-of-way to protect endangered fish. App. A-8. The court reasoned that the special use permits themselves, "from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way." *Id.* The court explained that its conclusion was supported by several statutes including FLPMA, 43 U.S.C. § 1765(a), the National Forest Management Act,

16 U.S.C. § 1604(g)(3), the Organic Administration Act, 16 U.S.C. § 475, and MUSYA, 16 U.S.C. § 528. *Id.* at A-8 and A-9. The court concluded that the addition of a minimum flow condition to the permits for use of National Forest lands violated no "valid existing rights" protected by Section 701 of FLPMA, because the permits were originally issued under the authority of the 1901 Act and were always revocable at the discretion of the Forest Service. *Id.* at A-9 and A-10.

Finally, the court rejected the Petitioners' claim that the Forest Service's actions constituted a seizure of water rights in conflict with this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978). App. A-10. The court explained that *New Mexico* addressed the power of Congress to make an implied reservation of water rights when establishing the National Forests, but did not address the Forest Service's power to restrict the use of rights-of-way over federal land to protect fish and wildlife. *Id.* Quoting this Court's decision in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917), the court explained that this case was "not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Id.*

REASONS FOR DENYING THE PETITION

1. None of the Court's criteria for granting a writ of certiorari has been met. Petitioners do not identify any circuit conflict and no conflict exists between the court of appeals decision and *United States v. New Mexico*, 438 U.S. 696 (1978). As explained by the court of appeals, this

case does not involve an implied reservation of water rights under the federal reserved rights doctrine or otherwise present a controversy over water rights. App. A-10. Rather, the case involves the statutory powers of the Forest Service to condition the use of revocable rights-of-way for the use of federal land where necessary to protect endangered fish. As this Court made clear in *Utah Power and Light*, 243 U.S. at 411, State water rights and federal rights-of-way are distinct matters that must be analyzed separately. The existence of a State water right does not guarantee a right-of-way over federal land.

2. This case does not present an important question of federal law warranting the Court's review. Rather, the case involves a narrow statutory question concerning the power of the Forest Service under FLPMA and other federal land management statutes to condition the use of a revocable permit for an irrigation ditch right-of-way across federal land where ditch operations under the right-of-way permit may imperil the survival of an endangered species both on and off National Forest lands. The court of appeals correctly decided that FLPMA and other federal statutes provided sufficient discretionary authority over the right-of-way permits at issue to trigger the consultation obligations of Section 7 of the ESA.

3. The court of appeals decision does not raise significant federalism concerns. The decision does not in any way permit the Forest Service to exercise general control over the water resources flowing off the National Forests or otherwise change the limited nature of federal authority to affect such rights. Under the court's decision, the Forest Service's authority to affect the manner in which State water rights may be exercised is limited, as always, to situations where the exercise of those rights

requires access to federal lands and the water right holder holds no vested right-of-way under federal law. The existing balance between the power of federal land managers to regulate access to and use of federal lands and the power of the states to allocate water resources has existed for over a century and was confirmed by this Court almost 90 years ago in *Utah Power and Light*. Nothing in the court of appeals decision in this case alters or seeks to alter that balance.

A. The Decision in This Case Does Not Conflict With Any Circuit Court or Supreme Court Decision.

Petitioners assert that certiorari is warranted based on a perceived conflict between the court of appeals decision and *United States v. New Mexico*, 438 U.S. 696 (1978). Petition at 15-18. However, the court of appeals correctly concluded that *New Mexico* was not relevant to the outcome of this controversy.

In *New Mexico*, the Court was called upon to determine the amount of water the United States reserved when it set aside a national forest under the "implied-reservation-of-water doctrine." 438 U.S. at 698-700. Under this doctrine, "Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorized him to reserve 'appurtenant water then unappropriated to the extent needed to accomplish the purposes of the reservation.'" *Id.* at 700, quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (emphasis in original). The amount of water impliedly reserved by Congress under this doctrine is limited to the "amount of water necessary to fulfill the purposes of the reservation, no more." *Id.*

The Court then examined the original purposes of the national forests to determine the quantity of water impliedly reserved when the national forests were set aside from the public domain in the late 19th century. The Court held that under the Organic Administration Act of 1897, 16 U.S.C. § 495, Congress intended national forests to be reserved for only two purposes – "to conserve the water flows and to furnish a continuous supply of timber" – and did not impliedly reserve water for other purposes such as fish and wildlife protection. *New Mexico*, 438 U.S. at 707-08. The Court recognized that the enactment in 1960 of MUSYA, 16 U.S.C. § 528, broadened the purposes of the national forests to include these and other objectives but held that MUSYA was not intended to expand the reserved water rights of the United States. *New Mexico*, 438 U.S. at 713.

Unlike *New Mexico*, the federal actions in this case do not rest on any implied reservation of water rights for National Forest lands. Instead, they rest on Congress's extremely broad powers under the Property Clause, U.S. Const. Art. IV, Sec. 3, to enact regulations to control the use and disposition of public lands. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897). As this Court has held, Congress's powers under the Property Clause are "without limitations" and are "analogous to the police power of the several States." *Kleppe*, 426 U.S. at 540. Because this case involves the broad powers of Congress to restrict the use of rights-of-way over federal land to accomplish legitimate legislative purposes, and does not involve any federal reservation of water rights, there is no conflict with the "implied-reservation-of-rights" doctrine articulated in *New Mexico*.

Petitioners contend that the Forest Service may not exercise its delegated powers to restrict the use of rights-of-way across federal land in any way that would impair the use of State water rights. *See* Petition at 15-21. This Court rejected this argument long ago in *Utah Power and Light v. United States*, 243 U.S. 389 (1917), and had no occasion to revisit it in *New Mexico*. In *Utah Power and Light*, the Court held that State water right holders have no authority to maintain pipelines and other facilities on National Forest lands absent compliance with federal statutes and regulations controlling access to Forest Service land (specifically, the 1901 Act and its implementing regulations). *Id.* at 411. Writing for the Court, Justice Van Devanter reasoned that State water laws have "no bearing" upon a controversy involving the use of Federal lands, "save as they may have been adopted or made applicable by Congress." *Id.* at 405. He explained:

> [T]he inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

Id. The Court also made clear that rights-of-way across federal lands are legally distinct from the right to appropriate water.

> Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, *for this is not a controversy over water*

> *rights but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned.*

Id. at 410-11 (emphasis added).

The Ninth Circuit correctly applied the principles of *Utah Power and Light* as they have been uniformly applied by other circuit courts. *See City and County of Denver v. Bergland*, 695 F.2d 465, 483 (10th Cir. 1982). As Justice Van Devanter held in *Snyder v. Colorado Gold Dredging Co.*, 181 F. 62, 69 (8th Cir. 1910), "[t]he right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner . . . ; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch." *Accord Hallauer v. Spectrum Props.*, 143 Wn.2d 126, 143-44, 18 P.3d 540, 549 (2001). Under these circumstances, there is simply no conflict with the Court's decision in *New Mexico*.

Petitioners contend that the Forest Service may not use its land management authority "to do indirectly what it has no authority to do directly, reallocate private water rights granted under state law thereby confiscating them in order to benefit fish." Petition at 18. However, nothing in the record supports the claim that the Forest Service has confiscated or otherwise taken or reallocated any water rights. As Petitioners acknowledge (Petition at 12), any water not diverted as a result of the condition placed on Petitioners' special use permits is subject to appropriation by Petitioners from points of diversion that do not require access to federal land. Indeed, under the agreed

operations plan for renewal of the Early Winters Ditch permit evaluated in the NMFS biological opinion, users of the Early Winters Ditch already exercise their water rights from private wells when operation of the ditch is restricted by the minimum flow conditions added to their special use permit. *See* AR at EW 1200; Exhibit 1 to Respondents' Summary Judgment Brief at 13. If the Forest Service had "confiscated" or "appropriated" Petitioners' water rights as alleged, the water would now belong to the Forest Service and could not be diverted by Petitioners or other appropriators from a non-federal point of diversion.

Petitioners also contend that conflicts exist between the court of appeals' interpretation of the Organic Act and MUSYA and this Court's interpretation of the same statutes in *New Mexico*. Petition at 16-18. In *New Mexico*, however, the Court focused on the scope of the implied reservation of water rights associated with the establishment of the National Forests. In this case, by contrast, the court of appeals and the district court analyzed the Forest Service's *power to regulate* rights-of-way across National Forest land under these and other statutes. The Court's holding in *New Mexico* that MUSYA's broadening of the purposes of the national forests did not expand the reserved water rights of the United States has no bearing on the Forest Service's power to *regulate the use of its own lands* to advance outdoor recreation, range, or wildlife and fish purposes. Indeed, in FLPMA, Congress expressly authorized the Forest Service to issue and renew rights-of-way for "ditches . . . for the . . . transportation . . . of water" subject to conditions that will "minimize damage to fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. §§ 1761(a)(1), 1765(a).

In short, because this case concerns the power of the federal government to regulate access to its lands, it is controlled by the Court's decision in *Utah Power and Light*. Because the case does not in any way involve an implied reservation of water rights or any other feature of the Court's holding in *New Mexico*, it is not in conflict with that decision or any other Supreme Court case.

B. This Case Does Not Present an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court.

Petitioners claim in various places that this case presents important questions that warrant issuance of a writ of certiorari. However, all of Petitioners' arguments are premised on the theory that the Forest Service has "confiscated" State water rights for its own use. *See, e.g.*, Petition at 2. As discussed earlier, Petitioners' arguments fundamentally mischaracterize the nature of the Forest Service's actions. The Forest Service did not confiscate any State water rights, it simply placed conditions on the use of rights-of-way across federal lands to protect statutorily established Federal interests. As this Court held in *Utah Power and Light*, a right-of-way over federal land is a property interest distinct from the right to appropriate water and may only be acquired "by complying with some applicable statute and the lawful regulations." 243 U.S. at 410-11.

The rights-of-way at issue here involve ditches constructed *after* the Okanogan National Forest was reserved from the public domain and constructed under authority of

revocable special use permits issued in accordance with the 1901 Act. 43 U.S.C. § 959.[2] The 1901 Act expressly provided that such special use permits cannot be held to "confer any right, or easement, or interest in, to, or over" any Federal land. *Id.* Because Petitioners had no "valid existing rights" in Forest Service land that could be protected by Section 701(h) of FLPMA, the Forest Service was under no legal obligation to renew Petitioners' special use permits, let alone omit conditions necessary to comply with federal law, when they expired in 1996.

Since the Forest Service had the power to decline to renew the permits altogether, it plainly had the discretion under FLPMA to condition its renewal of the permits on restrictions necessary to prevent harm to endangered fish from reduced stream flows. *See, e.g., Public Lands Council v. Babbitt*, 529 U.S. 728, 741-43 (2000) (government could modify revocable permits under Taylor Grazing Act to meet new environmental goals); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987) (power to deny a permit includes the lesser power to conditionally approve it). Indeed, FLPMA expressly *requires* the Forest Service to include conditions in right-of-way permits where they

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[2] No permanent rights-of-way or easements exist under the 1866 Mining Act, 43 U.S.C. § 661, because the ditches were constructed well *after* the lands in question were reserved from the public domain as a forest reserve. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 447-48 (1955); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939); *Hage v. United States*, 51 Fed. Cl. 570, 583 (2002). This distinguishes the present case from several other cases involving Mining Act rights-of-way where courts have imposed limits on the federal government's power to restrict the use of ditches crossing federal land. *E.g., Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967).

are necessary to minimize damage to fish and wildlife habitat and require compliance with applicable water quality standards.[3] 43 U.S.C. § 1765. Where use of a ditch right-of-way is likely to reduce flows in a stream to the point that fish and wildlife habitat are harmed and water quality standards are violated, the Forest Service not only has the authority under FLPMA to either deny the permit application or condition its approval on terms necessary to prevent such harm but it also has the duty to do so. The Forest Service's express powers under FLPMA relating to rights-of-ways are reinforced by more general statutes such as MUSYA, 16 U.S.C. § 528, and the National Forest Management Act, 16 U.S.C. § 1604(g), which authorize the Forest Service to take actions to protect fish and wildlife within the National Forest system.

Because the Forest Service had the discretion to either decline to renew the permits or condition its renewal of the permits on implementation of measures to protect fish and wildlife habitat and water quality, it was required by Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to consult with NMFS over the effect that renewal of the permits would have on the endangered steelhead trout and chinook salmon that inhabit the streams on and off National Forest lands affected by those diversions. *See* 50 C.F.R. § 402.03 (requiring consultation for all actions where there is "discretionary federal involvement or control"). And, because agencies are required

[3] Washington state water quality standards protect stream flows needed to maintain fish habitat and other beneficial uses of water. *See Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 718-19 (1994).

by the ESA to consider both the direct and indirect effects of their actions on endangered species "together with the effects of other activities that are interrelated or interdependent with that action," the effect of reduced flows resulting from use of the diversions on threatened and endangered species was a necessary and proper subject of Section 7 consultation. 50 C.F.R. § 404.02; *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) ("The fact that the reduction in water does not result 'from direct federal action does not lessen the [government's] duty under § 7.'"), quoting *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976). As NMFS made clear in its biological opinions, the decreased stream flow resulting from the continuing operation of the diversions on Forest Service land was subject to consultation under Section 7 as an *indirect* effect of the action – not the action itself. AR at EW 1185; SKY 915.

Properly analyzed, as it was by the court of appeals, this case involved a straightforward application of "properly stated" federal right-of-way and endangered species law to renewal of revocable right-of-way permits. As such, there is no basis for issuance of a writ of certiorari.

C. The Court of Appeals Decision Raises No Federalism Concerns.

Finally, Petitioners contend that the Court should grant a writ of certiorari because the court of appeals decision raises important issues of federalism. Petition at 11-14. In essence, Petitioners contend that the Forest Service is usurping the authority of the State of Washington to

manage water resources by taking actions that result in a *de facto* priority for instream flows over more senior out-of-stream uses. *Id.* at 12. This position once again confuses appropriate and well-established federal regulation of the use of federal land with state authority over state water rights.

The court of appeals decision recognizes the authority of federal agencies to condition a revocable permit for a ditch right-of-way across federal land to protect an endangered or threatened species. Such a result should not be surprising as this Court's 1917 decision in *Utah Power and Light* made clear that a State water right holder must obtain the permission of the United States if the right holder wishes to use reserved federal lands to convey the water to his private property. *See Solicitor's Opinion, Death Valley National Monument – Appropriation of Water*, 55 Interior Dec. 371, 373 (Oct. 22, 1935) (rule that the federal government surrendered to the states the right to control the use of water "does not apply with respect to reserved public lands, unless the water can be diverted at a point not affected by the reservation or unless a right of way has been obtained in accordance with laws of the United States"). The permit conditions appropriately leave the state water right holder free to exercise the state water right, either by accepting permit conditions the Forest Service must impose in order to comply with federal laws governing the use of federal lands, or by exercising the water right in a way that does not require permissive use of federal lands. Any other outcome would risk subordinating the requirements of federal law that apply to federal lands to state law.

It was clear on the face of the 1901 Act and Petitioners' special use permits themselves that the Forest Service

always had the power to revoke the rights-of-way at issue in this case or include new conditions where necessary to protect federal interests. Petitioners essentially are asking the courts to rewrite their revocable permits and grant them permanent easements by judicial fiat in derogation of the statutory powers of federal land managers to revoke or condition revocable special use permits in accordance with FLPMA and the ESA. The relief requested by Petitioners would itself raise serious concerns under the Supremacy Clause as it would render the Forest Service's statutory powers over rights-of-way across federal lands subservient to the decisions of State water resource agencies. The court of appeals decision maintains the existing and appropriate balance between the federal government's statutory powers to regulate rights-of-way in order to protect its property and interests and the authority of the states to regulate the use of water.[4]

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[4] Congress sought to address some of Petitioners' concerns when it enacted the "Ditch Bill" which authorizes the Secretary of Agriculture to issue permanent easements for irrigation ditches crossing Forest Service land that were in existence before the enactment of FLPMA (Oct. 21, 1976). Pub. L. 99-545, 100 Stat. 3047 (Oct. 27, 1986). To qualify for a permanent easement under the Ditch Bill, however, existing agricultural water right holders were required to submit an application to the Forest Service on or before December 31, 1996. 43 U.S.C. § 1761(c)(1). Despite being notified of their rights under the Ditch Bill, neither Skyline nor Early Winters submitted an application for a permanent easement to the Forest Service before this deadline. *See* AR at SKY 229, EW 184.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

DATED: February 27, 2004

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Appendix A-1

43 U.S.C. § 959

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 22 – EASEMENTS

§ 959. Rights-of-way for electrical plants, etc.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timer or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him

that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Appendix B-1

43 U.S.C. § 1765

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35 – LAND POLICY AND MANAGEMENT
SUBCHAPTER V – RIGHTS-OF-WAY

§ 1765. Terms and conditions

Each right-of-way shall contain –

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and

(b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration

feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

(5)

Supreme Court, U.S.
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No. 03-1071

In the Supreme Court of the United States

COUNTY OF OKANOGAN, WASHINGTON, ET AL.,
PETITIONERS

v.

NATIONAL MARINE FISHERIES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Forest Service, when renewing revocable special use permits that authorize use of National Forest land for irrigation ditches, may impose conditions that limit the amount of water conveyed through the ditches to avoid jeopardizing endangered fish.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Acton v. *United States*, 401 F.2d 896 (9th Cir. 1968), cert. denied, 393 U.S. 1121 (1969)	18
Bradshaw v. *United States*, 47 Fed. Cl. 549 (2000)	18
Cappaert v. *United States*, 426 U.S. 128 (1976)	14
City & County of Denver v. *Bergland*, 695 F.2d 465 (10th Cir. 1982)	11
Hallauer v. *Spectrum Props., Inc.*, 18 P.3d 540 (Wash. 2001)	12
Kleppe v. *New Mexico*, 426 U.S. 529 (1976)	17
Light v. *United States*, 220 U.S. 523 (1911)	17
PUD No. 1 of Jefferson County v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994)	13
Public Lands Council v. *Babbitt*, 529 U.S. 728 (2000)	16
Public Util. Dist. No. 1 v. *State, Dep't of Ecology*, 51 P.3d 744 (Wash. (2002)	12, 13
Snyder v. *Colorado Gold Dredging Co.*, 181 F. 62 (8th Cir. 1910)	11
Tulare Lake Basin Water Storage Dist. v. *United States*, 49 Fed. Cl. 313 (2001)	17
United States v. *Fuller*, 409 U.S. 488 (1973)	18
United States v. *New Mexico*, 438 U.S. 696 (1978)	10, 13, 14, 15
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	18

Case—Continued: Page

Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 10, 11, 12, 17

Constitution, statutes and regulation:

U.S. Const.:
Art. IV, § 3, Cl. 2 (Property Clause) 12, 14
Amend. V (Takings Clause) 17
Act of June 4, 1987, ch. 2, 30 Stat. 34 2
Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (43 U.S.C. 959) 3, 16
Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 4
Act of Oct. 21, 1976, Pub. L. No. 94-579, § 701(h), 90 Stat. 2786 4
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* ... 2
16 U.S.C. 1536 (§ 7) 16
16 U.S.C. 1536(a)(2) 4
16 U.S.C. 1536(b)(3)(A) 5
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 4
43 U.S.C. 1701 note 4, 15
43 U.S.C. 1761(a)(1) 4, 15
43 U.S.C. 1765(a) 4, 15
Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.* 2-3
16 U.S.C. 528 ..... 3, 15
National Forest Management Act, 16 U.S.C. 1600 *et seq.* 3
16 U.S.C. 1604(g)(3)(A) 3, 15
16 U.S.C. 1604(g)(3)(B) 3, 15
16 U.S.C. 475 2
16 U.S.C. 551 ..... 2, 15
50 C.F.R.:
Section 402.14 5
Section 402.14(a) 4
Section 402.14(h)(3) 5

Miscellaneous:

	Page
62 Fed. Reg. 43,937 (1997)	7
64 Fed. Reg. 14,308 (1999)	7
67 Fed. Reg. 7122 (2002)	8
Proclamation No. 27, 29 Stat. 904	5

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 347 F.3d 1081. An earlier opinion of the court of appeals (Pet. App. C1-C6) is not published in the *Federal Reporter* but is reprinted in 74 Fed. Appx. 739, and was withdrawn by 79 Fed. Appx. 350. The opinion of the district court (Pet. App. D1-D19) is unreported.

JURISDICTION

The initial opinion of the court of appeals was issued on August 14, 2003. A petition for rehearing was denied on October 24, 2003 (Pet. App. B1-B2). The substitute opinion of the court of appeals was issued on October 29, 2003, and the court's judgment (Pet. App.

A11-A12) was entered on that date. The petition for a writ of certiorari was filed on January 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge conditions imposed by the United States Forest Service in two special use permits that authorize the permit holders to use ditches on land in the Okanogan National Forest to convey water. The challenged conditions require the permit holders to modify diversion operations, if necessary, in order to maintain specified minimum flows in the Early Winters Creek and Chewuch River. The conditions were imposed to ensure that the Forest Service's discretionary decision to issue the permits did not jeopardize the continued existence of two species of fish listed as endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Both the district court and court of appeals upheld the permit conditions.

1. a. In 1897, Congress enacted the Act of June 4, 1897 (Organic Act), ch. 2, 30 Stat. 34, which authorized the creation and management of forest reserves (now known as national forests). The Organic Act provided that the purposes of the reserves were "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 475. The Organic Act authorized the Forest Service to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551. In 1960, Congress enacted the Multiple-

Use Sustained-Yield Act (MUSYA), 16 U.S.C. 528 *et seq.*, to supplement the purposes behind the creation and maintenance of the national forests. See 16 U.S.C. 528. The MUSYA declared that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528. In 1976, Congress enacted the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.*, which requires land management plans for the national forests to take into consideration the "protection of forest resources, to provide for * * * watershed, wildlife, and fish;" and to "provide for diversity of plant and animal communities." 16 U.S.C. 1604(g)(3)(A) and (B).

b. Congress has also authorized the grant of rights-of-way through national forests for various purposes, including water ditches. The rights-of-way at issue in this case were first issued under the Act of February 15, 1901 (1901 Act), ch. 372, 31 Stat. 790, 43 U.S.C. 959 (repealed 1976). The 1901 Act authorized the Secretary of the Interior, upon approval of the Department under whose supervision a federal reservation of land falls and "upon a finding by him that the same is not incompatible with the public interest," to permit the use of rights-of-ways through forest reservations for water ditches. 43 U.S.C. 959. The 1901 Act further provided: "That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." 43 U.S.C. 959. Thus, the 1901 Act provided a ditch operator with a license revocable at the discretion of the government rather than a vested property

interest. After jurisdiction over forest reserves was transferred to the Secretary of Agriculture in 1905, see Act of Feb. 1, 1905, ch. 288, 33 Stat. 628, persons seeking rights-of-way across reserved forest lands to construct and operate water ditches had to apply to the Forest Service for a special use permit.

In 1976, Congress repealed the 1901 Act and other laws governing issuance of rights-of-way on federal lands and replaced them with provisions of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.* FLPMA authorizes the Secretary of Agriculture to renew rights-of-way through national forests for ditches for the transportation of water, 43 U.S.C. 1761(a)(1), and requires the rights-of-way to contain terms and conditions that will "minimize damage to * * * fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. 1765(a). FLPMA provides that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. 1701 note (Savings Provision), Pub. L. No. 94-579, § 701(h), 90 Stat. 2786. But FLPMA does not enlarge the rights of permit holders whose existing permits are only revocable licenses.

c. The ESA, which was enacted in 1973, requires each federal agency to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. 1536(a)(2). To that end, whenever a federal agency plans to take an action that "may affect" a threatened or endangered species, the agency must consult with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) (consulting agency) before taking the action. 50 C.F.R. 402.14(a). Formal consultation typically concludes with

the issuance of a biological opinion by the consulting agency that assesses the likelihood of jeopardy to the listed species and whether the proposed action will result in destruction or adverse modification of the species' critical habitat. See 50 C.F.R. 402.14. If the consulting agency determines that the proposed action is likely to jeopardize the continued existence of the species or result in an adverse modification of critical habitat, it must determine whether there are any "reasonable and prudent alternatives." 16 U.S.C. 1536 (b)(3)(A); 50 C.F.R. 402.14(h)(3).

2. a. The Washington Forest Reserve, predecessor to the Okanogan National Forest, was established by Presidential Proclamation on February 22, 1897. Proclamation No. 27, 29 Stat. 904; Pet. App. A3. In 1903, the founders of the Skyline Ditch Company (Skyline) applied for a permit to construct and maintain a water ditch located in the Forest. Pet. App. A3. The Department of the Interior approved Skyline's application with the proviso that the permit would be "subject to revocation by the Secretary of the Interior, in his discretion, at any time." *Ibid.* In October 1903, a special use permit was issued that stated that the permit was "[t]erminable at the discretion of the Forester of the U.S. Department of Agriculture." *Ibid.* In 1971, the permit was superseded by a "revocable and nontransferable" special use permit, which provided that the permit could be terminated "at the discretion of the regional forester or the Chief, Forest Service," and could be renewed only if the permit holder complied with "the then-existing laws and regulations governing the occupancy and use of National Forest Lands." *Id.* at A3-A4.

In 1909, the predecessor to the Early Winters Ditch Company (Early Winters) applied to the Forest Service

for a special use permit to construct and operate an irrigation ditch on national forest land. On October 16, 1909, the Forest Service issued a permit that required the holder to "comply with all the laws and regulations governing National Forests" and provided that the permit would "terminate . . . at the discretion of the Forester." Pet. App. A4. Renewal permits similarly stated that the permits were terminable at the discretion of the Forest Service and further stated that the permits conferred no right upon the permit holder to use the water involved. *Ibid.* Beginning in 1971, the permits provided a fixed expiration date and stated that they were subject to renewal only if the permit holder complied with "the then-existing laws and regulations governing the use and occupancy of National Forest Lands." *Ibid.*

All subsequent permits for the two ditches contained similar conditions. For example, they provided that new permits would be issued "in the absolute discretion of the Forest Service," that they could be "amended at the discretion of the Forest Service to incorporate new terms required by law," and that the permit holder was required to comply with all applicable federal laws, including "relevant environmental laws." Pet. App. A4. The permits also stated that they did "not convey any legal interest in water rights as defined by applicable State law." *Ibid.*[1]

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[1] Because both the Skyline Ditch and the Early Winters Ditch were constructed after creation of the Washington Forest Reserve, petitioners are incorrect in asserting (Pet. 3) that the ditches were built on "unreserved" public land. The record establishes that petitioners' water rights also post-date creation of the Reserve in 1897. See 2 C.A. Supplemental Excerpts of Record (SER) 316 (Early Winters water rights date from 1907); *id.* at 317 (Skyline water rights date from 1902).

b. Between 1997 and 1999, steelhead trout and chinook salmon, two species of fish that inhabit Early Winters Creek and the Chewuch River, were listed as endangered under the ESA. 62 Fed. Reg. 43,937 (1997); 64 Fed. Reg. 14,308 (1999). Because the Forest Service concluded that the Skyline and Early Winters permits were likely to adversely affect the steelhead and chinook, it initiated consultation under the ESA with NMFS. Pet. App. A5-A6; 1 C.A. Supplemental Excerpts of Record (SER) 77-80.[2]

In its biological opinion on the Skyline permit, NMFS determined that the permit would jeopardize the chinook and steelhead. Pet. App. A5; 1 SER 113. NMFS proposed that the Forest Service condition the permit to require that Skyline repair fish screens and headgate structures and modify or curtail its diversion of water when flow levels in the Chewuch River fall below specified levels at specified times. Pet. App. A6; 1 SER 115-116. The Forest Service modified Skyline's permit by providing Skyline with a new Operation and Management Plan containing the instream flow requirements recommended in the biological opinion. Pet. App. A6; 1 SER 131. Skyline, which is not a party to this action, did not contest the permit conditions. Instead, Skyline proposed to comply with the conditions by substituting groundwater for reduced diversions from the river and by replacing the ditch with an enclosed pipe conveyance system, which would reduce diversions by eliminating the need for water that is now

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[2] Although each permit was renewed in 1998, the permit holders were given notice that the ESA consultation process was not complete and that the permits might be amended to include conditions required by the consulting agency. Pet. App. A5.

lost because of leakage during conveyance. 1 SER 86, 87; 67 Fed. Reg. 7122 (2002).

NMFS prepared a draft biological opinion on the Early Winters permit that concluded that the proposed permit would jeopardize the chinook and steelhead. Before NMFS prepared the final opinion, Early Winters agreed to accept an instream flow requirement in its Operation and Maintenance Plan. 2 SER 209, 212-213. Surface water diversion would be replaced or augmented as necessary by groundwater obtained through wells. *Id.* at 213. Based on Early Winters' agreement to modify its Operation and Maintenance Plan, NMFS found in its final biological opinion that the proposed permit was not likely to jeopardize the species or adversely modify critical habitat. Pet. App. A6; 2 SER 212, 230, 240. Early Winters ditch users subsequently obtained state approval to change the point of water diversion and to install groundwater extraction wells that allow them to obtain their full water allocation when diversion through the Early Winters ditch is reduced or shut down because of low flow. *Id.* at 213, 302-314.

3. Petitioners—the Early Winters Ditch Company, two landowners, and Okanogan County—filed suit for declaratory and injunctive relief against the Forest Service, FWS, and NMFS, alleging, in relevant part, that the Forest Service lacked authority to impose the instream flow conditions on the Skyline and Early Winters permits. C.A. E.R., Tab 1.

The United States District Court for the Eastern District of Washington granted summary judgment in favor of the government. Pet. App. D1-D19. The court began by observing that petitioners had mischaracterized the case in asserting that it involved the question whether the government had authority to confiscate

petitioners' water rights. *Id.* at D3. The court noted that "this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter." *Ibid.* The court explained that the government was not claiming any water rights by conditioning the special use permits, because petitioners retain their water rights and may be able to divert the water through alternate means or from an alternate diversion point. *Ibid.*

Turning to the question whether the government had authority to impose the permit conditions, the court held that the statutes governing the management of national forests, in particular the MUSYA, authorized the Forest Service to impose minimum instream flow restrictions on a special use permit to protect fish. Pet. App. D4-D10. The court further held that the terms of the particular permits at issue here did not restrict the Forest Service's authority to impose conditions on the permits. *Id.* at D10-D13. Because the Forest Service had authority under applicable statutes and the permits to impose the instream flow conditions, the court held that the ESA required the Forest Service to exercise its authority to condition the permits in order to ensure that their renewal would not jeopardize the continued existence of endangered species. *Id.* at D14-D16.

4. The court of appeals affirmed. Pet. App. A1-A10. Reviewing the statutes that govern management of national forests and the language of the permits, the court concluded that the Forest Service had authority to restrict the use of revocable rights-of-way to protect endangered fish. *Id.* at A7-A10. The court agreed with petitioners that the ESA does not grant the Forest Service powers that it does not otherwise have, but the court concluded that the Forest Service had ample authority to condition the permits under the Organic

Act, the MUSYA, and FLPMA. *Id.* at A8-A9. The court held that the savings clause of FLPMA preserving valid existing rights was inapplicable here because petitioners had no vested rights to use the ditches when FLPMA was enacted. *Id.* at A9. The court explained that the "rights-of-way were always, by their written terms, revocable at the discretion of the federal government." *Ibid.* The court also rejected petitioners' reliance on *United States* v. *New Mexico*, 438 U.S. 696 (1978). *New Mexico*, the court explained, did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. Pet. App. A10.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. All of the reasons that petitioners offer to support their request for review are based on the erroneous premise that the instream flow restrictions placed on the revocable right-of-way permits confiscate petitioners' state water rights. It is firmly established, however, that a state water right is distinct from, and does not carry with it, the right to convey the water across federal land.

In *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917), this Court held that power companies with state water rights could not maintain pipelines and other facilities on national forest lands without complying with federal law regulating access to Forest Service land. The Court held that state laws respecting water rights have "no bearing" on a controversy involving the use of federal lands unless they have been adopted or

made applicable by Congress. In a statement directly applicable here, the Court stated:

> Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water-rights, but over rights of way through lands of the United States, which is a different matter and is so treated in the right-of-way acts before mentioned.

243 U.S. at 410-411 (citing *Snyder* v. *Colorado Gold Dredging Co.*, 181 F. 62, 69 (8th Cir. 1910)).

As explained in *Snyder*, under the common law, the right to water does not carry with it a right to convey the water across another landowner's property, even if that is the only means of conveying the water to the land on which it will be used:

> The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.

Snyder, 181 F. at 69. See *City & County of Denver* v. *Bergland*, 695 F.2d 465, 483-484 (10th Cir. 1982) (citing that principle in holding that Denver's right to use certain waters did not include the right to maintain water diversion facilities on national forest lands). Washing-

ton law accords with that general common law principle. *Hallauer* v. *Spectrum Props., Inc.*, 18 P.3d 540, 548-549 (Wash. 2001) (water right does not include right to convey water across the lands of another).

The Forest Service's imposition of restrictions on the ditch companies' rights-of-way across the Okanogan National Forest thus does not appropriate any of petitioners' water rights. On the contrary, the ditch companies may continue fully to exercise their water rights by transferring the point of diversion of the water to a location that does not require conveyance of the water across federal land. Under Washington law, a change in the point of diversion is available (regardless of the impact on instream flows) if, as here, the water has been put to beneficial use and the change can be made without injury to existing rights. *Public Util. Dist. No. 1* v. *State, Dep't of Ecology*, 51 P.3d 744, 752-753 (Wash. 2002). Indeed, Early Winters, the only ditch company that is contesting the permit conditions, has already obtained approval to transfer its point of diversion. See pp. 7-8, *supra*.[3]

Thus, contrary to petitioners' suggestion, the court of appeals' opinion does not recognize a general "federal authority to reallocate state water when the water crosses federal land." Pet. 11. The court's decision merely recognizes federal authority to regulate revoca-

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[3] Petitioners suggest (Pet. 3, 6) that their state water rights include ownership of the point of diversion even though that point is located on federal land. Contrary to that suggestion, rights to federal land cannot be acquired under state law, but only as provided by an Act of Congress. See U.S. Const. Art. IV, § 3, Cl. 2; *Utah Power & Light Co.*, 243 U.S. at 404. Moreover, even if petitioners' water rights included the point of diversion, those rights would still not include an easement or vested right-of-way to transfer the water across federal land. See pp. 11-12, *supra*.

ble rights-of-way across federal land. As *Utah Power & Light* firmly established almost 90 years ago, the exercise of federal power to regulate rights-of-way for water conveyances over federal land neither displaces state authority to allocate water rights nor effects an appropriation of water rights. That remains true even when the federal regulation takes the form of minimum stream flow requirements. Cf. *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 720-722 (1994) (minimum stream flow requirements imposed under Clean Water Act do not allocate water or impermissibly intrude on state authority to allocate water); *Public Util. Dist. No. 1*, 51 P.3d at 764-766 (imposition of instream flow conditions to preserve water quality does not appropriate water rights and is not governed by state water appropriation law).

Because the court of appeals' decision does not authorize federal confiscation or reallocation of water rights, petitioners err in contending (Pet. 11-14) that the court's opinion disrupts Western water law and the federal-state balance. The power of federal land managers to deny, revoke, or condition use of federal lands for ditches and the authority of States to allocate water resources have coexisted for over a century, and the court of appeals' opinion correctly reflects that co-existence.

2. Petitioners also err in contending (Pet. 15-21) that the the court of appeals' decision conflicts with *United States* v. *New Mexico*, 438 U.S. 696 (1978). The question presented in *New Mexico* was how much water the United States had reserved under the "implied-reservation-of-water doctrine" when it set aside a national forest. *Id.* at 698. Under that doctrine, "Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes,

impliedly authorized him to reserve 'appurtenant water then unappropriated *to the extent needed to accomplish the purpose of the reservation.*'" *Id.* at 699-700 (emphasis added) (quoting *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976)).

In *New Mexico*, the Court held that a forest reservation under the Organic Act did not include an implied reservation of water for aesthetic, recreational, stock-watering or fish-preservation purposes. 438 U.S. at 704-705, 718. The Court further held that, although the MUSYA broadened the purposes for which national forests "*are* established and *shall* be administered," to include preserving wildlife and fish, the MUSYA did not expand the water rights reserved to the United States at the time of a forest's creation. *Id.* at 713-715.

New Mexico is inapposite here because the government is not claiming any water rights in this case, and the authority for the permitting decisions concerning the ditches across national forest lands does not rest on an implied reservation of water rights for those lands. Rather, the authority to condition permits authorizing use of federal land rests on Congress's broad powers under the Property Clause of the Constitution. U.S. Const. Art. IV, § 3, Cl. 2.

As the court of appeals correctly held, the federal statutes governing forest management, in which Congress exercised its plenary power under the Property Clause to regulate federal land, authorize the Forest Service to condition permission to use those lands. See Pet. App. A8-A9. Here, the conditions that the Forest Service imposed are reasonable and indeed are directly germane to the purposes of the National Forests themselves. The Organic Act provides the Forest Service with authority to regulate "occupancy and use" of National Forests to "insure the objects of such reserva-

tions." 16 U.S.C. 551. The MUSYA expressly provides that "the national forests are established and shall be administered for * * * wildlife and fish purposes." 16 U.S.C. 528. NFMA confirms that fish and watershed protection are proper forest management objectives. See 16 U.S.C. 1604(g)(3)(A) and (B). And FLPMA expressly requires permits that "renew rights-of-way over" public lands for "ditches * * * for the * * * transportation of * * * water" to "contain * * * terms and conditions which will * * * minimize damage to * * * fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. 1761(a)(1), 1765(a).

Contrary to petitioners' contentions (Pet. 15-18), *New Mexico*'s holding that forest reservations under the Organic Act did not impliedly reserve water for fish or wildlife purposes does not mean that the Forest Service lacks authority to regulate the use of national forest land for the benefit of fish and wildlife. If anything, *New Mexico* supports the existence of that authority because the Court recognized in that case that the MUSYA broadened the purposes of national forests and requires the Forest Service to administer all national forests, "including those previously established," for fish and wildlife purposes. 438 U.S. at 714. *New Mexico* neither overrules nor erodes this Court's holding in *Utah Power & Light Co.*, which rejected an attempt, similar to petitioners' attempt here, to recast a dispute over rights-of-way over federal land as a water rights issue and to construe narrowly federal authority to regulate the use of national forest land.

Petitioners are also incorrect in arguing (Pet. 19-21) that FLPMA's preservation of "valid existing rights" (43 U.S.C. 1701 note) prevents the Forest Service from imposing the permit conditions at issue here. Petitioners have never possessed any vested right to main-

tain a ditch across national forest land. The 1901 Act provided permit holders with only a revocable license and stated that a permit could "not be held to confer any right, or easement, or interest in, to, or over any public land, reservation or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (43 U.S.C. 959) (repealed 1976). Moreover, petitioners' "rights-of-way were always, by their written terms, revocable at the discretion of the federal government." Pet. App. A9; compare *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 741-743 (2000). And, as discussed above, petitioners are incorrect in contending that the permit conditions confiscate their water rights under state law. See pp. 10-13, *supra*.

3. Petitioners also mistakenly assert (Pet. 21-23) that the court of appeals' decision holds that Section 7 of the ESA creates federal authority to allocate water rights. Contrary to that assertion, the court of appeals expressly stated that "the ESA does not grant powers to federal agencies they do not otherwise have." Pet. App. A8. As the court of appeals also recognized, however, the ESA requires federal agencies to take steps within their existing authority to ensure that their discretionary actions do not jeopardize the continued existence of endangered species. See *ibid.* Because both the statutes governing management of national forests and the terms of the Skyline and Early Winters permits authorize the Forest Service to condition the permits and allow it to do so in order to protect fish and wildlife, the ESA required the Forest Service to exercise that authority in a way that did not jeopardize the endangered chinook and steelhead.

4. Petitioners incorrectly argue (Pet. 23-25) that the Forest Service's authority must be narrowly construed to avoid constitutional concerns. Contrary to petitioners' suggestion (Pet. 23-24), the principle that police

powers are generally reserved to the States does not restrict federal control over the use of federal land, which is plenary. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 536-541 (1976) (Congress's power over public lands is without limitations and analogous to the police power of the States); *Utah Power & Light Co.*, 243 U.S. at 405 (Congress has power to control use and occupancy of federal lands "and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power"); *Light* v. *United States*, 220 U.S. 523, 536 (1911) (the federal government may "prohibit absolutely or fix the terms on which its property may be used"). The cases on which petitioners rely (Pet. 23-24) are inapposite because they do not involve the exercise of federal control over federal property.

Petitioners' argument (Pet. 24-25) that the Forest Service's actions raise constitutional concerns under the Fifth Amendment's Takings Clause also lacks merit. There is no takings issue in this case because the Forest Service has not confiscated petitioners' water rights. *Tulare Lake Basin Water Storage District* v. *United States*, 49 Fed. Cl. 313 (2001), on which petitioners rely (Pet. 24), does not support their takings claim. The plaintiffs in *Tulare Lake* sought compensation for the taking of contractual rights which the court held entitled them to receive a fixed volume of water from a reclamation project. *Id.* at 314-315. Here, petitioners challenge a restriction on permits to use federal land that by their terms are completely revocable at the discretion of the Forest Service without compensation to the permit holders. A revocable license or permit, no matter how valuable to the holder, does not constitute property for which the government is liable upon modi-

fication or termination. *Bradshaw* v. *United States*, 47 Fed. Cl. 549, 553 (2000); *Acton* v. *United States*, 401 F.2d 896, 899-900 (9th Cir. 1968), cert. denied, 393 U.S. 1121 (1969); see *United States* v. *Fuller*, 409 U.S. 488 (1973). Even if there were some possibility that Forest Service's actions constituted a taking, petitioners' remedy would not be a suit to enjoin the actions but rather a suit for compensation. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(6)

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No. 03-1071

In the

Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory authority of the United States Forest Service to manage public lands includes the authority to preserve in-stream flows for federally protected species by ordering private parties to stop diverting stream water, through ditches they built long ago on federal land, thereby confiscating their water rights vested under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

I. THE FOREST SERVICE'S CONDITIONS EVISCERATE THE LONG-STANDING DEFERENCE OF THE FEDERAL GOVERNMENT TO STATE WATER LAW DECISIONS 2

A. The Forest Service's Unauthorized Confiscation of Private Water Rights, Vested Under State Law, for the Forest Service's Own Purposes, Is an Important Question This Court Should Review 3

B. The Forest Service Declined Traditional Deference to State Rules and Instead Unilaterally Confiscated State Vested Water Rights for Its Own Use Raising Serious Federalism Questions 6

II. THE FOREST SERVICE MISCHARACTERIZES THIS COURT'S PRECEDENT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Adams v. United States, 3 F.3d 1254 (9th Cir. 1993) 5

Haberman v. Sander, 7 P.2d 563 (Wash. 1932) 8

Hage v. United States, 51 Fed. Cl. 570 (2002) 5

Hubbard v. Washington, 936 P.2d 27 (Wash. Ct. App. 1997) 6-7

Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) .. 3-5

In re Water Rights in Crab Creek & Moses Lake v. Allen, 235 P. 37 (Wash. 1925) 7

John v. United States, 247 F.3d 1032 (9th Cir. 2001) 3

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 3

Neubert v. Yakima-Tieton Irrigation District, 814 P.2d 199 (Wash. 1991) 2

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 8-9

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001) 3-4

United States v. New Mexico, 438 U.S. 696 (1978) ... 2, 8-9

Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 6

Statutes

16 U.S.C. § 475 1-2

§ 528 2

§ 1531, *et seq.* 1

TABLE OF AUTHORITIES—Continued

Page

33 U.S.C. § 1341(d) 9

43 U.S.C. § 1701, *et seq.* 2

Wash. Rev. Code § 90.03.345 6

Miscellaneous

30 Cong. Rec. 967 (1897) 9

STATEMENT OF THE CASE

Contrary to the claims of the federal government, this case does not concern the right to use federal land—the Forest Service has not restricted the Petitioners' (Water Owners) use of federal land. Instead, this case concerns the unauthorized condition Respondents (Forest Service) placed on land use permits that strip from the Water Owners their water rights that are vested under state law. Indeed, nothing about the federal land changed. The Water Owners' ditches remain in place on federal land, exactly as they existed prior to the Forest Service's conditions, with one exception—*the ditches are dry*. Appendix (App.) at A-6, D-2.

Consistent with Congress' purposes in the Organic Administration Act of 1897 (Organic Act), 16 U.S.C. § 475, and subsequent federal land management statutes, the Forest Service granted the Water Owners a right-of-way to construct and operate an irrigation ditch on federal land to carry private water from a stream crossing federal land. Now, as a result of consultation pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.*, the Forest Service uses its power to condition use of the irrigation ditch to keep the Water Owners' water in the stream.

No party disputes the Forest Service may regulate federal land. Likewise, no party disputes the Water Owners possess vested state water rights. Instead, the dispute concerns whether the Forest Service has authority to unilaterally alter the vested water rights of the Water Owners by denying them the long-held right to withdraw their irrigation water into the permitted irrigation ditches that cross federal land. In short, does the Forest Service have the authority to appropriate Water Owners' irrigation water for instream uses?

ARGUMENT

I

THE FOREST SERVICE'S CONDITIONS EVISCERATE THE LONG-STANDING DEFERENCE OF THE FEDERAL GOVERNMENT TO STATE WATER LAW DECISIONS

The water at stake in this case is controlled by the State of Washington which embraces the Western states' law of prior appropriation. *Neubert v. Yakima-Tieton Irrigation District*, 814 P.2d 199, 201-02 (Wash. 1991). Almost a hundred years ago, the Water Owners obtained rights to a certain and specific quantity of water from the state. App. at A-4. At that time, the Water Owners wished to take the water and transfer it to their land through a ditch on federal land. The Water Owners obtained a special use permit from the Forest Service to construct and maintain the ditch. App. at A-4, D-2. The Forest Service required the permit for the protection of federal land. *Id.* Now, one hundred years later, the Fish and Wildlife Service and the National Marine Fisheries Service want that water. Rather than apply to the state for a water right, as did the Water Owners and other rights holders, the federal agencies have the Forest Service use the irrigation ditch permit as a vehicle to confiscate Water Owners' vested water rights. In conditioning the land use permit specifically for the purpose of confiscating water, and certainly not to protect its interests in federal land, the Forest Service acted *ultra vires*, outside its delegated authority.

The purported authority of the Forest Service under the Organic Act, 16 U.S.C. § 475, Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. § 528, and Federal Land Policy and Management Act (FLMPA) 43 U.S.C. § 1701, *et seq.*, to reallocate for itself the Water Owners' vested water rights upsets decades of federal deference to state water law. *United States v. New Mexico*, 438 U.S. 696, 702 (1978). This

precedent would grant the United States near plenary power to confiscate private water rights any time the waters travel over federal land. *See* Amicus Brief of the California Farm Bureau Federation in Support of Petitioners at 2 (California's Central Valley, the backbone of California's irrigated agriculture, relies on water emanating from the predominantly federally owned Sierra Nevada and Coast Ranges). As such, this case raises important issues involving water rights and federalism which this Court should address.

A. The Forest Service's Unauthorized Confiscation of Private Water Rights, Vested Under State Law, for the Forest Service's Own Purposes, Is an Important Question This Court Should Review

Water rights hold a special place in right-of-way jurisprudence. Black letter law holds that "a right in real property includes all incidentals possessed by the grantee and without which the property granted cannot be fully enjoyed." *Hunter v. United States*, 388 F.2d 148, 153-54 (9th Cir. 1967). Courts have also long recognized that water rights are property rights under state law and that water rights exist in the *use* of water. *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). Concerning water rights, as with all other property rights, without use of the property, the property has no value. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

Courts have recognized that government has no right to confiscate these rights for its own purposes. In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), water users entitled to water sued the United States alleging a taking of their water right. *Id.* at 314. In circumstances very similar to those here, the Federal Bureau of Reclamation modified its operations pursuant to a Biological Opinion issued by NMFS in order to reserve water instream to protect fish listed under the ESA. *Id.* at 315. The opinion's

conditions decreased significantly the water users' water. *Id.* at 316.

As it does here, the federal government in *Tulare Lake* attempted to justify its water seizure by arguing it merely provided water to benefit listed fish. *Id.* at 316-17. The court rejected the federal government's argument:

> In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. . . . Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.

Id. at 319 (citation omitted).

Similarly here, the Forest Service confiscated vested water rights for itself. However, because the government's *Tulare Lake* argument was a losing one, the Forest Service now argues it is merely regulating the use of federal land—notwithstanding that it has accomplished the same result as in *Tulare Lake*. That result is depriving Water Owners of their water so the Forest Service can use it for federal purposes. Here, the Forest Service employed a permit intended by Congress to regulate land use to, instead, deny vested water rights owners the ability to withdraw their water from their permitted point of diversion so the Forest Service could use the water for its own purposes.

Access to water is an essential element of a water right, especially when that water involves federal land. Courts have also held that the federal government may not deny such access. For example, access over federal land inheres in a right to water on federal land. *Hunter v. United States*, 388 F.2d 148. In

Hunter, a rancher claimed a right to water within the Death Valley National Monument. The Ninth Circuit noted the rancher had lawfully appropriated water under state law and that the appropriation occurred prior to other persons. *Id.* at 153. Thus, the Ninth Circuit held the rancher possessed water rights unimpaired by the federal land reservation, despite having no right to trespass on federal land. *Id.* Moreover, the Ninth Circuit held that although the water right did not include a right to use the land, the law entitled the rancher to access water by some means: "[H]e should be allowed a right of way over those [national monument] lands to divert the water by one of the methods contemplated by the statute." *Id.* at 154.

The Ninth Circuit upheld similar access to state water rights on federal land in *Adams v. United States*, 3 F.3d 1254 (9th Cir. 1993). There, the plaintiff owned two noncontiguous parcels surrounded by national forest land and claimed a right to transport water from one parcel to another across national forest land. *Id.* at 1255, 1260. The Ninth Circuit held the plaintiff's right to the water under state law also entitled him to transport the water from one parcel to another, and that the Forest Service did not possess authority to deny the plaintiff's water use. *Id.* at 1260.

More importantly, the Court of Federal Claims held that vested rights in the use of water flowing through ditches across federal land also entail the ability to access that water *regardless* of whether a property right exists in the right-of-way across federal land. *Hage v. United States*, 51 Fed. Cl. 570 (2002). Similar to the situation in this case, a rancher sued when the federal government extinguished grazing rights and subsequently diverted water for federal use on land the Forest Service managed. *Id.* at 573. The court held the government could not prohibit the rancher from accessing water only to redirect it to another place for federal use. *Id.* at 584.

The Forest Service argues, however, that *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917), supports its authority to regulate water use and access to water on federal land. *See* Brief for the Federal Respondents in Opposition (Opp.) at 10. But, the Forest Service misconstrues this Supreme Court precedent. In *Utah Power*, the federal government sought to enjoin the illegal occupancy of federal land by "squatters" who constructed on federal land, without authority, diversion dams, reservoirs, pipe lines, power houses, and transmission lines. 243 U.S. at 402-03. In other words, in contrast to this case, the government sought to prevent the *trespass* and *illegal occupation* of federal land. *Utah Power* concerned only the right of trespassers to occupy federal land and had nothing to do with the federal government's authority to prohibit private parties' rights to enjoy water rights granted under state law.

Nevertheless, the decision below allows the Forest Service, and by extension any other federal agency with state appropriated water running across its land, to confiscate that water for its own purposes. Such federal agency authority will unsettle any certainty in western water rights determinations and as a practical matter strip from states their primary role in establishing water rights. Thus, this case raises a serious question which should be reviewed by this Court.

B. The Forest Service Declined Traditional Deference to State Rules and Instead Unilaterally Confiscated State Vested Water Rights for Its Own Use Raising Serious Federalism Questions

Washington state water law provides that instream flows, like other uses of water, may be appropriated. Wash. Rev. Code § 90.03.345. These instream uses are recognized and upheld according to their relative priority. *Hubbard v. Washington*, 936 P.2d 27, 29 (Wash. Ct. App. 1997). As with any other appropriation of water, such a water right is "perpetual and operates to the exclusion of all subsequent

claims." *Id.* But the Forest Service ignored this statutory mechanism to obtain instream flows and, instead, took unilateral action to appropriate the Water Owners' already existing vested water rights for their own use. As a result of ditch permit conditions designed to restrict Water Owners' ability to divert their water, the Water Owners will lose access to their water and the Forest Service will have provided for itself, outside the process established by Washington State, a water right for instream flows.

The Forest Service argues, however, that it has not appropriated the Water Owners' water since the Water Owners are not precluded from finding a new point from which to divert their water. Opp. at 12. But, of course, the original point of diversion is an integral component of the water right. Thus, that an owner may seek an amendment to a water right to change a point of diversion does not change the fact the old water right has been confiscated. The Forest Service's commandeering of the Water Owners' vested water rights so it could put it to instream use constitutes an unlawful confiscation of the Water Owner's water right. Forcing the Water Owners to obtain from the state a new point of diversion (assuming one is available) also constitutes an unlawful confiscation of the Water Owners' water rights because, without current access to their water, a water right is useless. *In re Water Rights in Crab Creek & Moses Lake v. Allen*, 235 P. 37, 39 (Wash. 1925).[1]

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[1] The government cites two applications made by a member of the Early Winters Ditch Company to add two new points of withdrawal (two wells) to replace water that can no longer be withdrawn via the Early Winters Ditch and that the applications have been approved by the Department of Ecology. Government's Supplemental Excerpts of Record (SER) at 302. However, this right to seek to amend a water right is in no manner equal to the right already enjoyed by the Water Owners. As a matter of general application, the ability of a water rights holder to avail itself of its water right depends on

(continued...)

Thus, merely arguing the Water Owners "can get their water somewhere else" cannot justify the Forest Service's permitting actions to deny the Water Owners present use of their water.

Thus, the Forest Service has unilaterally created for itself a de facto water right at the direct expense of the hundred-year-old, vested water right enjoyed by the Water Owners. This action is unprecedented and conflicts with the traditions of Western water law whereby states established water rights are deferred to by the federal government. *United States v. New Mexico*, 438 U.S. at 702. Certiorari should be granted to put a halt to this federal government strategy to obtain through unilateral allocation the rights to waters crossing their land, even though those rights are already possessed by others.

II

THE FOREST SERVICE MISCHARACTERIZES THIS COURT'S PRECEDENT

The Forest Service relies heavily on two cases, but misinterprets both. First, the Forest Service maintains the actions of the Forest Service to impose minimum stream flow requirements do not establish a water right. *See PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 720-21 (1994), and that the water rights themselves have not been regulated or appropriated. Opp. at 13. Second, despite the fact that "[n]ational forests were not to be reserved

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[1] (...continued)
whether or not the change in diversion point would damage the rights of a junior water rights holder. *Haberman v. Sander*, 7 P.2d 563, 565 (Wash. 1932) ("[A] senior appropriator may change his point of diversion, provided that such change does not infringe upon existing vested rights."). That one irrigator was able to amend and obtain permission to drill costly wells to replace the water lost by the Forest Service's appropriation is certainly not a guaranteed right, as such amendments can be protested, objected to, and refused. *See* Government's SER at 303 (protest of Lee Bernheisel).

for aesthetic, environmental, recreational or wildlife preservation purposes," *United States v. New Mexico*, 438 U.S. at 715, the Forest Service maintains that the Organic Act and MUSYA provide sufficient authority for the Forest Service to divert private water rights for the benefit of wildlife preservation.

Jefferson County involved no federal agency nor any federal statute at issue here. Rather, it dealt merely with whether a minimum stream flow requirement under state law was permissible condition of a section 401 certification under the Clean Water Act. *Jefferson County*, 511 U.S. at 710. This Court noted that a state is allowed to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of state law." *Id.* (citing 33 U.S.C. § 1341(d)). Furthermore, this Court recognized that the Clean Water Act allowed states to impose flow conditions; it did not, however, provide any federal mandate that states do so, nor did it authorize the federal government to impose such restrictions. Indeed, "[s]ections 101(g) and 510(2) [of the Clean Water Act] preserve the authority of each State to allocate water quantity between users . . . ." *Id.* at 720.

The Court's holding in *United States v. New Mexico*, does not support the Agencies' reading of the Organic Act and MUSYA. This Court recognizes that national forest lands exist only to fulfill the dual purposes"'[t]o conserve the water flows, and to furnish a continuous supply of timber.'" 438 U.S. at 707 (quoting 30 Cong. Rec. 967 (1897)). This Court's holding is not specific to the implied reservation-of-water doctrine, but rather to the purposes for which Congress created the national forests, which do not include "for the benefit of fish and wildlife." The Ninth Circuit's decision and the Forest Service's position would improperly expand the "purposes" of the National Forest system to include the advancement of any activity which might benefit fish and wildlife.

The Water Owners do not dispute the state's ability to regulate water rights, including instream flows. But the Ninth Circuit's interpretation of federal law would trump the states' control and allow the confiscation of private water rights which cross federal lands. If the federal government should find that fish or wildlife might benefit from those waters, there is nothing under the Ninth Circuit's new standard which would prevent the federal government from obtaining the use of such waters by unilaterally extinguishing access to private water rights. Such a practice, and the resulting attempts to find new rights to sources of water, will wreak havoc in the West and demands this Court's review.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

DATED: April, 2004.

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No. 03-1071

Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF WASHINGTON STATE FARM BUREAU, WASHINGTON STATE POTATO COMMISSION, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE GRANGE AND NEW MEXICO CATTLE GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUES	2
INTEREST OF AMICUS CURIAE	2
SUMMARY OF THE ARGUMENT	4
STANDARD OF REVIEW	6
ARGUMENT	6
I. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Reallocate State Water By Requiring a Minimum Instream Flow as a Condition of a Special Use Permit Thereby Assuming the Role of the State in Appropriation of Water	6
II. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Commandeer Water Granted to a Private Party by State Law	12
III. This Court Should Grant the Petition for Writ of Certiorari Because the Ninth Circuit Opinion Misconstrues Federal Authority By Allowing the Forest Service to Usurp State Water Rights Through the Exercise of Authority to Regulate Rights-of-Way	14
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

California v. United States, 438 U.S. 645 (1978) 8

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 17

County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003) ..... *passim*

Elko County Bd. of Supervisors v. Glickman, 909 F. Supp. 759 (D. Nev. 1995) 18

Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981) 17

Hage v. United States, 51 Fed. Cl. 570 (2002) 8, 19

Hallauer v. Spectrum Props., 18 P.3d 540 (Wash. 2001) 17

Hubbard v. State of Washington, 936 P.2d 27 (Wash. Ct. App. 1997) 9

Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) 16, 17

Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 8

In re Water Rights In Crab Creek & Moses Lake v. Allen, 235 P. 37 (Wash. 1925) 9

John v. United States, 247 F.3d 1032 (9th Cir. 2001) 16

Kansas v. Colorado, 206 U.S. 46 (1907) 8

Lessee of Pollard v. Hagan, 44 U.S. 212 (1845) 8

Offield v. Ish, 57 P. 809 (Wash. 1899) 9

Platte River Whooping Crane Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992) 15

TABLE OF AUTHORITIES – Continued

Page

States of America v. Alaska, 521 U.S. 1 (1997) 8

Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) 15

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001) 13, 14

United States v. Doremus, 888 F.2d 630 (9th Cir. 1989) 18

United States v. New Mexico, 438 U.S. 696 (1978) 10, 11

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 8

Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 5

STATUTES

Pub. L. No. 94-579, § 701(g) 16

Pub. L. No. 94-579, § 701(h) 16

Wash. Rev. Code § 90.03.010 9

Wash. Rev. Code § 90.03.247 ..... 9, 10

Wash. Rev. Code § 90.03.250 9

Wash. Rev. Code § 90.03.345 9

16 U.S.C. § 1536(b)(4) 15

43 U.S.C. § 371 8

43 U.S.C. § 661 ..... 8, 18

43 U.S.C. § 1701 historical note 16

43 U.S.C. § 1761(a)(1) 5, 7

43 U.S.C. § 1761(b)(3) 17

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Supreme Court Rule 10 6

OTHER AUTHORITIES

Bennett Raley, et al., *Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of Pub. L. No. 104-127* (1997) 18

INTRODUCTION

In *County of Okanogan v. National Marine Fisheries Service*, the Ninth Circuit erred in its analysis of federal authority to deprive private parties of their state granted water rights through the exercise of the authority to regulate rights-of-way across federal land.[1] 347 F.3d 1081 (9th Cir. 2003). In the decision under review by the Ninth Circuit, the Forest Service ("FS") required the maintenance of minimum instream flows in a river that crosses federal land before any water could be diverted to irrigation ditches used by the Early Winters Ditch Company and other water users ("Ditch Company"). The FS did this by placing restrictions on the right-of-way permits issued for the water conveyance. The Ditch Company has senior appropriated rights to the water that the FS restricted. The FS lacked the authority to confiscate water in this manner because the allocation of water is an area of law that has been consistently reserved to the states. The Ninth Circuit addressed the authority of the FS to regulate rights-of-way while ignoring whether the authority existed to infringe on the role of the state in allocating water. This Court should grant review of this decision because the Ninth Circuit failed to address the critical issue of federal authority to confiscate a water right granted by the State of Washington.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. This brief was authored by Karen Budd-Falen and Michael P. Van Tassell, attorneys of Budd-Falen Law Offices, L.L.C.

ISSUES

1. Whether the FS can assume the role of the State of Washington by reallocating state water rights through the exercise of the authority to place conditions on permits granting rights-of-way across federal land.

2. Whether the FS has the power to confiscate water granted to a private party by the State of Washington through the exercise of the authority to place conditions on permits granting rights-of-way across federal land.

3. Whether the FS' statutory authority to place conditions on permits granting rights-of-way across federal land allows the FS to usurp state water rights.

INTERESTS OF AMICUS CURIAE

Amicus Curiae Washington State Farm Bureau ("WFB") is a general farm organization with almost 35,000 member families dedicated to representing the interests of farmers, ranchers and others in the agricultural industry throughout the state of Washington. Washington State Farm Bureau, *This is the Washington State Farm Bureau* <http://www.wsfb.com/StateFarmBureau/WaFarmBureau History.htm> (last accessed Feb. 23, 2004). WFB members rely upon water rights for irrigation of two million acres of food, contributing an estimated $7 Billion to the economy. *Id.* Water rights not only feed thirsty crops and people, they have a profound effect on the value of private property. In Washington, non-irrigated farm or pasture land is worth from $100 to $500 per acre, while the same land irrigated sells for $3000 to $15,000 per acre. *Id.* Thus, the elimination of irrigation can reduce private property

values, in some cases, to less than 1% of original value. WFB members have a significant vested interest in the protection of water rights, as well as the associated means of diversion and conveyance. WFB directly represents the interests of the Ditch Company in this case.

The New Mexico Cattle Growers Association ("NMCGA") also has a substantial interest in the outcome of this case. Among the purposes for the creation of the NMCGA is to ensure the continued viability of public lands ranching in New Mexico. Many NMCGA members own water rights that occur on public lands. These water rights are critical for NMCGA members in establishing base property for grazing permits as well as for watering of cattle on private lands adjacent to public land. Without complete access to these water rights, the livelihood of these ranchers would be severely imperiled.

The Washington State Potato Commission ("WSPC") also has a vital interest in protecting state water rights that occur within the boundaries of public land. The mission of the WSPC is to serve the potato growers of Washington State. The potato growers of Washington are dependent on sufficient water to support their crops. A significant amount of water used by potato growers originates on public lands. The WSPC seeks to preserve the water rights that occur on public land to protect the interests of potato growers in the State of Washington.

The Washington State Grange ("WSG") is a grassroots fraternal organization with its roots in agriculture. The WSG seeks to provide a voice for rural citizens of Washington. The protection of water rights is critical to the survival of rural citizens that depend on water to sustain agricultural operations. If water rights that happen to

occur on federal lands are compromised, the repercussions could be widespread within the rural community that the WSG seeks to protect.

The Building Industry Association of Washington ("BIAW") is dedicated to ensuring and enhancing the vitality of the building industry for the benefit of its members and the housing needs of citizens. The BIAW is also committed to reducing the scope of government and expanding free enterprise. The federal government's assertion of power to confiscate private water rights under the guise of regulation is a serious expansion of governmental authority. The BIAW seeks to prevent governments from overstepping their bounds and negatively impacting private property rights. The precedent that will result if this governmental assertion of power is allowed to stand is unacceptable. When government authority expands, the interests of the BIAW are adversely affected.

SUMMARY OF THE ARGUMENT

The Early Winters Ditch conveys private water rights across public land managed by the FS. Claiming endangered species protection, the FS imposed minimum instream flows as a condition to issuing a special use permit ("SUP") to the Early Winters Ditch Company for use of the Early Winters Ditch. The SUP conditions were imposed because the FS had concluded that the ditches involved were "likely to adversely affect the steelhead and chinook salmon" and that minimum instream flows were the necessary remedy. *County of Okanogan*, 347 F.3d at 1083-84.

The Ditch Company sued, claiming that the FS did not have the authority to impose instream flows, nor was

it required to do so by the Endangered Species Act ("ESA"). The District Court ruled against the Ditch Company on all counts, holding that the FS can condition a SUP to require minimum instream flows to protect endangered species where consistent with the forest purposes. Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Cross Motion for Summary Judgment (Mar. 14, 2002). On appeal, the Ninth Circuit affirmed the District Court. *County of Okanogan*, 347 F.3d at 1082. The Ninth Circuit also found that the FS had authority to impose instream flows through restrictions in the use of ditch rights-of-way. *County of Okanogan*, 347 F.3d at 1086. The Ninth Circuit's decision rested primarily on authority found in the Federal Land Policy and Management Act of 1976 ("FLPMA"). *Id.* at 1084 (citing 43 U.S.C. § 1761(a)(1)). The Ninth Circuit made this finding without addressing the conflict with state water law that resulted from the actions of the FS.

The heart of this case lies in the Ninth Circuit's assumption that the FS' condition did not impact a water right or involve a *de facto* reservation thereof. The Ninth Circuit decision states that this case "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *County of Okanogan*, 347 F.3d at 1086 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917)). Nearly every part of the Ninth Circuit's opinion relies upon this assumption. Unfortunately, the assumption is incorrect as a matter of fact and law. The Ninth Circuit completely disregarded the conflict between federal and state authority in this case, therefore, this Court should

grant the petition for writ of certiorari to resolve this important issue.

STANDARD OF REVIEW

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." Among these compelling reasons are (1) a decision conflicting with precedent in another circuit; or (2) "an important question of law that has not been, but should be, settled by this court . . . ." *Id.*

The important federalism issues presented by the FS' decision and the Ninth Circuit's holding are important questions of law that should be resolved by this Court.

ARGUMENT

I. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Reallocate State Water By Requiring a Minimum Instream Flow as a Condition of a Special Use Permit Thereby Assuming the Role of the State in Appropriation of Water

For nearly 100 years now, the FS has been issuing SUPs to the Ditch Company, which allow the water right held by the Ditch Company to flow unimpeded through the half mile of the Early Winters Ditch that runs through federal land. In 1998, the FS changed this century old *status quo* by telling the Ditch Company that if it wanted to use its water right, it had to let the first 35 cubic feet

per second of its water right flow past the point of diversion. This minimum instream flow imposed on the Ditch Company is dominant in that the Ditch Company cannot divert a drop of its water right unless and until this flow is met. Thus, depending upon natural availability of water, the Ditch Company may be deprived of up to 100% of its appropriated water right.

The Ninth Circuit concluded that the FS' actions were "not a controversy over water rights" and, therefore, the FS could legally impose minimum instream flows as a condition of a SUP. *County of Okanogan*, 347 F.3d at 1086. The Ninth Circuit was wrong on both counts.

Specifically, the Ninth Circuit held that because the FS has the authority to regulate the use of the rights-of-way in a national forest to protect endangered fish, the FS had the authority to impose minimum instream flows as a condition to the SUPs. *Id.* The Ninth Circuit reviewed the history of the ditches and SUPs involved in the case. *Id.* at 1084. "The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way." *Id.* at 1085. The FLPMA was cited, with support from other statutes, as granting authority to the FS to "'grant, issue, or renew rights-of-way over' public lands for 'ditches . . . for the . . . transportation . . . of water.'" *Id.* (citing 43 U.S.C. § 1761(a)(1)).

Although the Ninth Circuit acknowledged that the FLPMA was "subject to valid existing rights," this statement was only analyzed with regard to the right to use the ditches. *Id.* It was found that there were no vested rights to use the rights-of-way because the rights-of-way were "revocable at the discretion of the federal government." *Id.* The Ninth Circuit concluded its analysis by dismissing

any argument that this case had anything to do with state water law. "[T]he FLPMA specifically authorizes the [FS] to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the [FS] defer to state water law." *Id.* at 1086.

It is a long established rule, that "navigable waters uniquely implicate sovereign interests." *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). The power to control "navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *States of America v. Alaska*, 521 U.S. 1, 5 (1997), *reh'g denied*, 521 U.S. 1144. This power was guaranteed to the states by the federal government upon admission of the new states to the Union and is recognized as the Doctrine of Equal Footing. *Id.*; *see also Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845).

Pursuant to the Equal Footing Doctrine, the State of Washington retains the sole authority to regulate and condition the flow of water within the State of Washington. *States of America*, 521 U.S. at 5. The right of the states to regulate the water within the state has been recognized time and time again by Congress and the Courts. *See Couer d'Alene Tribe of Idaho*, 521 U.S. at 261; *States of America*, 521 U.S. at 1; *California v. United States*, 438 U.S. 645 (1978); *Kansas v. Colorado*, 206 U.S. 46 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899); *Hage v. United States*, 51 Fed. Cl. 570 (2002); *and see* 43 U.S.C. § 661 (1986); 43 U.S.C. § 371 (1986).

Washington law states that all waters within the state belong to the public, subject to all existing rights. Wash.

Rev. Code § 90.03.010 (1992). The only way to acquire a water right in the State of Washington is by appropriation. *Id.* No appropriation of water can occur until a permit to appropriate is issued pursuant to state law. *Id.* at § 90.03.250. The essence of an appropriated water right is the ability to put the water to beneficial use. *Offield v. Ish*, 57 P. 809, 810 (Wash. 1899). Without the diversion of an appropriated water right, the right is useless. *In re Water Rights In Crab Creek & Moses Lake v. Allen*, 235 P. 37, 39 (Wash. 1925).

Under Washington law, minimum instream flows are treated as appropriations. *Hubbard v. State of Washington*, 936 P.2d 27, 29 (Wash. Ct. App. 1997); Wash. Rev. Code. § 90.03.345. Only the Washington Department of Ecology can impose any such instream flow. "No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive. . . . " Wash. Rev. Code § 90.03.247.

The State of Washington has exclusive power to control how water rights are vested, and holds exclusive authority to appropriate an instream flow. The FS' imposition of a minimum instream flow on a vested Washington water right directly usurps Washington law and sovereignty. The FS has reserved water to maintain a minimum instream flow in spite of Washington's stated authority over imposing such a requirement in waters within the State of Washington. *See Id.* The water in question has been appropriated under Washington law and constitutes a vested state water right. By placing a minimum instream flow requirement on these waters, the FS has taken the role of the State of Washington in the allocation of water resources within the State's sovereign borders.

The FS' actions in this case went well beyond an appropriation of a water right. When an instream flow is appropriated in Washington, that flow is considered a junior water right, subservient to all prior appropriations. *Id.* In this case, the FS requires that the Ditch Company give up the first 35 cubic feet per second of its water right for the privilege of transporting its water over a half mile of FS managed property. Thus, the FS did more than merely appropriate junior instream flow, it commandeered a portion of the Ditch Company's senior water right.

Depending on the amount of water present in the river, the Ditch Company will be denied the opportunity to exercise its vested state water right. In a period of low flow in the river there will not be sufficient water available to supply the amount of water appropriated under Washington state law as well as the amount of water demanded by the FS. The "regulation" imposed by the FS would require that the amount of water deemed necessary by the FS for fish be reserved and left untouched by any diversion of water. If there is a low flow then there will not be enough water in the river to allow the Ditch Company to obtain all the water that it is entitled to under its vested state water right. If the flow in the river is equal to or less than the amount that the FS has deemed necessary to protect fish, then the Ditch Company would be denied its entire vested state water right. The FS will have prohibited the exercise of the vested state water right. The FS will have asserted a water right senior to that of the Ditch Company's water right without even referencing state water law.

In *United States v. New Mexico*, 438 U.S. 696, 707-708 (1978), this Court ruled that Congress intended national forests to be reserved for two purposes: "to conserve the water flows, and to furnish a continuous supply of timber

. . . National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes" and, therefore, there is no implied reservation of water for other than the two main purposes. This Court went on to hold that with the passage of the Multiple Use Sustained Yield Act, "Congress intended the national forests to be administered for broader purposes after 1960 but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water." *Id.* at 715.

While the *New Mexico* case is not directly applicable to the present case because the FS is not claiming an implied reservation of water, the case does stand for the proposition that the FS cannot restructure or commandeer senior water rights. This is true in spite of the Ninth Circuit's assertion that the "FLPMA specifically authorizes the [FS] to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the [FS] defer to state water law." *County of Okanogan*, 347 F.3d at 1086.

As this Court in *New Mexico* makes clear, the FLPMA does not give the FS authority to usurp state sovereignty over water rights for the benefit of wildlife. This Court should grant the petition for review to recognize the implications that the FS' decision has on state sovereignty and the lack of federal authority that federal agencies have to usurp the role of a state in allocating water rights.

II. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Commandeer Water Granted to a Private Party by State Law

It is difficult to understand how the Ninth Circuit can conclude that this "is not a controversy over water rights, but over rights-of-way through lands of the United States." *County of Okanogan*, 347 F.3d at 1086. The Ditch Company's water right is clearly a matter of Washington water law, and the FS clearly has required that the Ditch Company give up a portion of that property right for the privilege of conveying it over FS administered land. A similar situation would arise if the FS commandeered vehicles which happen to drive on FS roads on the pretext that such action is not about ownership and use of vehicles, but about the FS' lawful maintenance of roads. Regardless of the semantics, the practical outcome in both cases is the complete taking of private property by the FS for the privilege of using a FS right-of-way. The FS lacks the authority to do this under any statute.

There is no practical difference between limiting a water right through permit conditions and an outright taking of the water right. As the United States Court of Federal Claims states:

> In the context of water rights, a mere restriction on use – the hallmark of a regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. . . . Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to

> use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313, 319 (2001). In *Tulare*, the Bureau of Reclamation imposed minimum instream flows on water rights to benefit endangered species. The Court held that this amounted to a complete physical taking of plaintiff's private property, despite the fact that the Bureau never officially reserved or appropriated a water right as against all users. *Id.*

The present case is analogous to the *Tulare* case. In both cases, a federal agency imposed conditions on a state water right which effectively denied the holder a portion of that right, a compensable property interest. The fact that the Plaintiffs in this case have not yet brought a takings claim seeking money damages in the United States Court of Federal Claims is irrelevant to the outcome of the case before this Court. Indeed, if the FS' actions in this case do amount to the taking of a compensable property interest, then the Ninth Circuit's entire opinion crumbles. The Ninth Circuit's opinion is based on FS authority to regulate rights-of-way across FS land. The opinion states that the FS could revoke those rights-of-way at any time at the discretion of the FS. *County of Okanogan*, 347 F.3d at 1085. If the rights that are to be analyzed are vested state water rights rather than unvested, revocable rights to use a ditch, the Ninth Circuit's opinion is incomplete.

If the FS wished to impose a senior minimum instream flow to benefit wildlife, it could have done so by condemnation, after providing due process and just compensation. It

did not. Instead, it accomplished the same thing by "conditioning" a SUP. As the *Tulare* case illustrates, such conditions do amount to a physical taking of private property. The practical result of the FS' action is that the Ditch Company must give up a portion of its water right prior to exercising the remainder. The FS does not have the authority under applicable law to deprive the Ditch Company of its water rights. The Ninth Circuit erred in so holding.

The lack of treatment of state water rights in the Ninth Circuit decision ignores the practical and legal reality that the FS action has deprived the Ditch Company of its vested state water right. This Court should grant the petition for review to recognize the implication on private water rights and the lack of federal authority to usurp those rights.

III. This Court Should Grant the Petition for Writ of Certiorari Because the Ninth Circuit Opinion Misconstrues Federal Authority By Allowing the Forest Service to Usurp State Water Rights Through the Exercise of Authority to Regulate Rights-of-way

The Ninth Circuit cites the FLPMA for the FS' authority to require minimum instream flows as a condition to a SUP, thereby reallocating state water rights. *County of Okanogan*, 347 F.3d at 1085. The Ninth Circuit decision dismissed the effect on state water rights as irrelevant to the legal question at hand. *Id.* at 1086. However, the FS action requiring a minimum instream flow profoundly affects state water rights and compromises the longstanding doctrine of deference to the states with regard to allocation of water resources in the West. Whether federal

authority to regulate rights-of-way under the FLPMA allows the FS to reallocate state water rights is a significant issue that this Court should review.

Through the ESA Section 7 consultation process, the FS imposed amendments to the SUPs that are the subject of this case. *Id.* at 1083-84. The amendments provided that "instream flows on the river be measured and that diversions to the ditch be limited to maintain certain instream flows." *County of Okanogan*, 347 F.3d at 1084. These amendments were described as "reasonable and prudent measures" to provide for fish under the ESA. *Id.*; *see* 16 U.S.C. § 1536(b)(4). The Ninth Circuit held that the "placement of restrictions in the right-of-way permits was within the authority of the [FS]." *Id.*

The Ninth Circuit correctly noted that "the ESA does not grant powers to federal agencies they do not otherwise have." *Id.* at 1085; *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 225 (D.C. Cir. 1992) ("the [ESA] directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act."). The Ninth Circuit went on to quote this Court in stating "that section 7 of the ESA 'amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act.'" *Id.* (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1978) (emphasis added, brackets omitted)). The Ninth Circuit then found "that the [FS] had the authority to restrict the use of the rights-of-way to protect the endangered fish." *Id.*

The FLPMA contains a savings clause that states "[n]othing in this Act shall be construed . . . (1) as affecting in any way any law governing appropriation or use of, or

Federal right to, water on public lands; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resource development or control." Pub. L. No. 94-579, § 701(g), *reprinted in* 43 U.S.C. § 1701 historical note. The FLPMA goes on to state that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* at § 701(h). Read as a whole, the savings clause is a neutral recognition of the status quo in state control over water.

The Ninth Circuit quoted portions of the savings clause and then found that the Ditch Company's "right-of-way permits did not grant vested property rights." *County of Okanogan*, 347 F.3d at 1085. This holding completely bypasses the pertinent issue in this case. The Ditch Company was not arguing that the FS action violated its vested rights in the right-of-way permits, it was arguing that the FS action violated its vested state water rights. These vested state water rights are property rights. *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). The FLPMA savings clause certainly applies to state water rights. The Ninth Circuit treated the entire case as a question of whether the FS had the authority to restrict rights-of-way on federal land. This is, at best, an incomplete analysis.

The savings clause protects water rights on federal land that existed before the passage of the FLPMA. Previous to the FLPMA, the Ninth Circuit held that federal law "approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by . . . the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *Hunter v. United States*, 388 F.2d 148, 152 (9th Cir. 1967) (citing *California*

Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-155 (1935)); *see Hallauer v. Spectrum Props.*, 18 P.3d 540, 552 (Wash. 2001) (holding that a landowner with a water right located on the property of another landowner is entitled to convey the water over the other landowner's property).

In *Hunter*, a national monument was established on federal land that Hunter had previously used for grazing. *Hunter*, 388 F.2d at 150-51. Hunter also had rights to water that had become surrounded by national monument land. *Id.* at 153. The United States brought the action to enjoin Hunter from grazing and watering cattle on the monument. *Id.* at 150. The Ninth Circuit found that Hunter could not continue to graze on the monument without a permit, but that Hunter's claim to water on the monument was a separate matter. *Id.* at 154. Even though the issue was not directly before the court, the Ninth Circuit found that where an individual had appropriated water rights on a national monument before establishment of the national monument, that individual "should be allowed a right of way over those lands to divert the water." *Id.* As in *Hunter*, this case involves previously appropriated water that the federal government is seeking to confiscate for a new federal purpose. The FS should be denied the authority to confiscate the water just as the National Park Service was in *Hunter*.

The FS does have authority to impose reasonable conditions on irrigation rights-of-way over federal lands. *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 103 (9th Cir. 1981); *see* 43 U.S.C. § 1761(b)(3). However, this authority does not allow the FS to commandeer state water rights in contravention of the savings clause. In 1997, a Congressionally created task force determined that the

authority to regulate rights-of-way was also subject to the savings clause. *See* Bennett Raley, et al., *Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of Pub. L. No. 104-127*, Part VI (1997). The task force concluded that the savings provision "makes it impossible for the [FS] to rely on FLPMA as a grant of authority . . . to impose bypass flow . . . requirements as a condition of land use authorizations." *Id.* Though the FS is granted authority to regulate rights-of-way across federal land, that authority does not allow the FS to use this authority to commandeer vested state water rights.

There is precedent that the FS may have some authority to regulate the exercise of state water rights on federal land. *See Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759 (D. Nev. 1995). In *Elko County*, ranchers sought unconditional access to maintain their ditches running through FS land. The Court held that the FS authority was limited to "reasonable" regulations. "[T]he authority [to] make rules and regulations . . . regarding the occupancy and use of the national forests . . . includes the right to reasonably regulate the exercise of vested water rights and accompanying rights-of-way obtained under 43 U.S.C. § 661." *Id.* at 764 (citations omitted). However, "reasonable" regulation, the Court stated, is "regulation which neither prohibits the ranchers from exercising their vested rights nor limits their exercise of those rights so severely as to amount to a prohibition." *Id.* (citing *United States v. Doremus*, 888 F.2d 630, 632 (9th Cir. 1989) (holding that mining operations conducted under a vested right, though subject to regulation, "'may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition.'" (citation omitted))); *see also*

Hage, 51 Fed.Cl. at 576-77. This case involves not only regulation of the vested water right, but an actual confiscation of the water right. This confiscation amounts to a prohibition on the exercise of the vested water right. Therefore, the FS has materially restricted the use of the vested water right, such regulation is not "reasonable" and is not within the authority of the FS.

The FS lacks the authority under the FLPMA to usurp state water rights through the requirement of minimum instream flows. In this case, state water rights have been extinguished under the guise of FS authority to regulate rights-of-way. This contravention of longstanding federal deference to states with regard to allocation of water as well as the disregard of various portions of the FLPMA should be rectified. This Court should grant the petition for review to resolve the conflict between the Ninth Circuit decision and established law regarding federal authority under the FLPMA to confiscate state water rights.

CONCLUSION

The decision of the Ninth Circuit that the FS has the authority to confiscate vested state water rights through exercise of the authority to regulate rights-of-way over federal land is incomplete and incorrect. The Ninth Circuit dismissed discussion of state water rights in this case and limited its analysis to federal authority over rights-of-way. The FS has in fact attempted to claim a right to water senior to all other state granted water rights. This usurpation of the role of the State of Washington is not supported by the precedent of this Court, nor is it consistent with federal land law as proclaimed by Congress. This Court

should grant the Petition for Writ of Certiorari to address this important federalism issue and overturn the decision of the Ninth Circuit.

Respectfully submitted,

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In The Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS BRIEF OF THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the federal government has the authority under various federal land use statutes pertaining to management of Forest Service lands to unilaterally deprive a private party of its vested state water rights by requiring dedicated instream flows simply because the water traverses federal lands on its way toward its designated end use.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO PROTECT STATES' AUTHORITY OVER WATER ESTABLISHED IN WELL-SETTLED WATER LAW JURISPRUDENCE	8
II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CLARIFY THE FEDERAL GOVERNMENT'S LIMITED ROLE IN WATER DISTRIBUTION	10
III. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ENSURE THAT FEDERAL LAND USE AUTHORITIES CANNOT BE USED TO EVISCERATE STATE WATER LAW	12
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

Basey v. Gallagher, 87 U.S. 670 (1875) 9

California v. United States, 438 U.S. 645 (1978) ..... *passim*

County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003) 5, 9, 13, 14

Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) 16

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 962 F.2d 27 (D.C. Cir. 1992) 16

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 7, 8

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001) 12

United States v. New Mexico, 438 U.S. 696 (1978) ..... *passim*

United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899) 9

CONSTITUTIONS:

U.S. CONST. amend. X 6

CAL. CONST., Art. X §§ 5 & 7 8

COLO. CONST., Art. 16 § 5 8

N.D. CONST., Art. 17 § 210 8

WYO. CONST., Art. 8 § 1 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

16 U.S.C. § 524 13

16 U.S.C. § 1536 15

43 U.S.C. § 321 7

43 U.S.C. § 383 7

43 U.S.C. § 946, *et seq.* 13

43 U.S.C. § 959 13

50 C.F.R. § 402.02 (2004) 16

Pub.L. No. 94-579, § 701(a), 90 Stat. 2743, *reprinted in* 43 U.S.C.A. § 1701 historical note 15

Pub.L. No. 94-579, § 701(g), 90 Stat. 2743, *reprinted in* 43 U.S.C.A. § 1701 historical note 17

RULES:

Sup. C. R. 37.2 1

Sup. C. R. 37.6 1

MISCELLANEOUS:

Arthur L. Littleworth & Eric L. Garner, *California Water* (1995) 2

California Department of Water Resources, *Overview of the State Water Project* (2004) 3

California Statistical Abstract (2003) 2

IDAHO CODE § 42-101 (2003) 8

United States Bureau of Reclamation, *Fact Sheet: The Central Valley Project: It's About Water* (2001) 3

INTEREST OF AMICUS CURIAE

Pursuant to Sup. C. R. 37.2, the California Farm Bureau Federation ("Farm Bureau") respectfully submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari.[1]

Farm Bureau is a nonprofit, tax-exempt California corporation and is California's largest farm organization. Farm Bureau's membership consists of **89,000** member families in 53 county farm bureaus located throughout California. Farm Bureau is a voluntary, nongovernmental, nonpartisan organization of owners and operators of farms and ranches, as well as other residents of California who are interested in the welfare of agriculture. Farm Bureau's members grow over 250 types of crops throughout the state and contribute the majority of agricultural production in California, which saw its agricultural marketing reach $27.2 billion in 2000. Most of these family farms and ranches rely on some form of irrigation water that either originates in or flows through federal landholdings. The facts and circumstances of how water physically flows to and irrigates California farms and ranches and the regulatory and legal framework by which it does so is not identical to the facts, regulations and laws addressed in the Petitioner's case. However, if the Ninth Circuit's decision

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[1] Pursuant to Sup. C. R. 37.6, counsel for *amicus* represents that it authored this *amicus* brief, and no counsel for any party in this case authored this brief in whole or in part. Further, no entity other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Written consent for *amicus curiae* participation in this case was granted by counsel of record for all parties. Letters reflecting this consent have been filed with the Clerk pursuant to Sup. C. R. 37.2(a).

in this case is not overturned, the privately-held vested water rights these members rely on to maintain their agricultural operations, as well as the state of California's entire water rights system, will be thrown into chaos.

California has more than nine million acres of irrigated land, approximately eight million of which is farm land.[2] Almost half of the farmland is in the Sacramento and San Joaquin Valleys (collectively the "Central Valley").[3] The Central Valley extends 500 miles from the convergence of the Coast Range and the Sierra Nevada at Mount Shasta in the north to the Tehachapi Mountains in the south. Its average width is 120 miles and it includes more than one third of the area of California.[4] This irrigated farm land is the backbone of California's agricultural industry, which has the highest output of any state in the nation. The water that is indispensable to this irrigated agriculture comes primarily from federal, state and local projects, as well as privately owned diversion systems. These systems harness waters emanating from the Sierra Nevada and Coast Ranges that encircle the Central Valley. Given that the Sierra Nevada and Coast Ranges are predominately federally owned, a significant number of the water rights on which California's irrigated agriculture is based would be jeopardized by the Ninth Circuit's decision.

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[2] California Statistical Abstract, p. 118 (2003). The Sacramento and San Joaquin Valleys are collectively referred to as the "Central Valley".

[3] *Id.*

[4] Arthur L. Littleworth & Eric L. Garner, *California Water*, p. 19 (1995).

Of the many water projects and diversions that facilitate agriculture in California, the federal Central Valley Project ("CVP") and California State Water Project ("SWP") deliver the greatest quantity of water, with average annual deliveries of 7 million acre-feet[5] (over 75% of which is used for agriculture)[6] from the CVP and 2.5 million acre-feet from the SWP (approximately 30% of which is used for agriculture).[7] Both of these projects would likely be impacted by the Ninth Circuit's decision. The CVP consists of over 35 federally funded dams, reservoirs, and canals located in the Central Valley. The largest unit of the CVP is Shasta Dam, located in the northern end of the Central Valley below the Shasta-Trinity National Forest. Other CVP units are located on tributaries to the Sacramento and San Joaquin Rivers that originate on federal land. For example, the Folsom Dam unit of the CVP relies on flows from the American River, which originates in El Dorado and Tahoe National Forests and the New Melones unit relies on flows from the Stanislaus River, which originates in the Stanislaus National Forest.

The SWP consists of 32 dams and reservoirs and extends from the Feather River tributary of the Sacramento River to southern California. The cornerstone of the SWP is Oroville Dam on the Feather River, which originates in Plumas National Forest. Both the CVP and SWP

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[5] An acre-foot is the volume of water necessary to cover one acre of land with one foot of water. This is equal to 325,900 gallons. *Id.* at 346.

[6] United States Bureau of Reclamation, *Fact Sheet: The Central Valley Project: It's About Water* (2001).

[7] California Department of Water Resources, *Overview of the State Water Project* (2004).

utilize the Bay-Delta, where the Sacramento and San Joaquin Rivers converge as they enter the San Francisco Bay, as a conduit to pump water for delivery through the Delta Mendota Canal and California Aquaduct, respectively. Additionally, both the CVP and SWP are operated pursuant to valid rights acquired under California water rights laws. Thus, federal actions to restrict or reallocate water flowing through federal lands would destabilize these two important water projects.

Perhaps more important are the multitude of local and privately owned projects used for agricultural purposes in California that rely on water diversions on or through federal land. In fact, the initial development of California hinged on the validity of individual water diversions through federal land.

As addressed later in this brief, in the Mining Act of 1866 Congress established the keystone principle of federal policy towards state water rights; namely, the federal government would strictly respect existing state water rights, as well as the necessary rights-of-way through federal land, when managing the immense federal land holdings in the western United States. Notwithstanding the passage of time, countless water users in California still utilize ditches, flumes, and pipelines for diversion water through rights-of-way on federal land that were established over a century ago and therefore depend on the adherence to this long-standing federal policy.

In short, the water users in the Central Valley and foothills of the Sierra Nevada and Coast Range, including members of Farm Bureau, rely on the sanctity of California's water rights allocation system and the federal government's repeated promise not to disturb the exercise of

water rights through federal land. Under the Ninth Circuit's holding, the water rights on which these users depend are placed in serious jeopardy. According to the holding in *County of Okanogan v. National Marine Fisheries Service,* 347 F.3d 1081 (9th Cir. 2003), the Forest Service may, under the guise of its land use authority, reallocate water flowing through federal land, to the harm of water users, without complying with California law. The transparent circumvention of established legal precedent and existing state water rights systems is illegal and will only lead to uncertainty and disruption of important economic activities.

Since the federal government is effectively attempting to reallocate water, this case is clearly a controversy over water rights and not a controversy over legitimate management of rights-of-way on federal lands, as determined by the Ninth Circuit and the district court. Because this case is, in fact, about the interaction of federal authority with state water rights systems, the Ninth Circuit's holding jeopardizes the entire system of water law and allocation throughout its jurisdiction.

SUMMARY OF ARGUMENT

Federalism is a cornerstone of the United States Constitution. By allowing both federal and state governments to govern the same territory, the Constitution solved the problem of combining an independent local government with an effective central government. The Tenth Amendment to the Constitution reserved for the

states all powers not delegated to the federal government or prohibited by the Constitution.[8] As this Court has recognized, "[t]he situations invoking the application of these principals [comity and federalism] have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so it may be said that the life of the law is not political philosophy but experience." *California v. United States*, 438 U.S. 645, 649 (1978). Based, in part on this dichotomy, states have generally made their own laws relating to the distribution and management of water: "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves **in conformity with State laws and without interference with those laws or with vested rights**." *Id.* at 664 n.18 (internal citations omitted) (emphasis in original).

The primacy of state authority over water law and the allocation of water rights is well settled. In adopting the Reclamation Act of 1902 (the "Act"), Congress expressly affirmed the exclusive right of individual states over water allocation. Section 8 of the Act provides that, "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right

[8] U.S. CONST. amend. X.

acquired thereunder. . . . "[9] 43 U.S.C. § 383. Further, this Court has consistently held that states have exclusive control over water rights. *See California*, 438 U.S. at 645; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *United States v. New Mexico*, 438 U.S. 696 (1978).

The Ninth Circuit's ruling places a dark cloud of uncertainty over private water rights for water which originates from or flows through federal lands. In light of the extensive federal land holdings present in the West,[10] this ruling will completely undermine the water law systems that currently exist throughout the states within the jurisdiction of the Ninth Circuit. The resulting chaos with respect to water distribution will negatively impact virtually every water right in these states and create general uncertainty among all water users. Farm Bureau therefore respectfully requests that this Court grant the instant petition for certiorari and restore states' exclusive rights over water.

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[9] Numerous other federal statutes contain similar language. *See, e.g.*, 43 U.S.C. § 321:

> . . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

(Desert Land Act of 1877).

[10] The federal government owns approximately 48 percent of California's land mass.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO PROTECT STATES' AUTHORITY OVER WATER ESTABLISHED IN WELL-SETTLED WATER LAW JURISPRUDENCE

The Ninth Circuit's opinion has granted the federal government, and specifically the U.S. Forest Service ("USFS") and the National Marine Fisheries Service ("NMFS")[11] the authority to do indirectly what it cannot do directly – use federal land use laws to manage water resources that Congress reserved exclusively to the states. *See California*, 438 U.S. at 653 (noting "the consistent thread of purposeful and continued deference to state water law by Congress.") *Id.*, *see also New Mexico*, 438 U.S. at 742 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). As the Court noted in *California*, "[B]efore many of the Western States had been admitted to the Union, Congress deferred to the growing local law." 438 U.S. at 654. This deference is reflected in numerous federal statutes where Congress requires federal agencies to defer to state water law. *See Sporhase*, 458 U.S. at 958-59. Moreover, numerous state constitutions and statutes, including California's, contain express language asserting absolute ownership over waters in their states. *See* CAL. CONST., Art. X §§ 5 & 7; COLO. CONST., Art. 16 § 5; N.D. CONST., Art. 17 § 210; WYO. CONST., Art. 8 § 1; IDAHO CODE § 42-101 (2003).

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[11] NMFS is now the National Oceanic and Atmospheric Administration Fisheries.

The Court in *California* noted that, "Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption. Because a very high percentage of land in the West belonged to the Federal Government, the canals and ditches that carried this water frequently crossed federal land." Because of the fear that new acts like the Homestead Act of 1862 and the Mining Act of 1866 might interfere with the Water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

§ 9, 14 Stat. 253.

As the Court noted in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 705 (1899), this was "a voluntary recognition of a pre-existing right of possession constituting a valid claim to its continued use." Congress intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition." *Basey v. Gallagher*, 87 U.S. 670 (1875).

The Ninth Circuit ignores this long-established precedent by asserting this is a case about land use authority and not water rights. *County of Okanogan*, 347 F.3d at 1086. However, the actions of USFS and NMFS

belie this assertion by requiring private vested water right holders to give up a portion of their vested water rights so more water can remain in stream for the benefit of fish, and to do so without any regard for seniority. If this case centered around land use authority, the reasonable and prudent alternatives adopted pursuant to the Section 7 consultation under the Federal Endangered Species Act ("ESA") should have only included measures affecting management of the **land** not allocation of the **water**. The federal government should not be allowed to do indirectly what it cannot do directly – reappropriate state water rights and circumvent state water law.

The Ninth Circuit's holding ignores long-established precedent and runs the risk of destroying the complex, well-established body of water law that has evolved in the West since the early 1800s. This petition for certiorari should be granted to reaffirm that states, not federal agencies, have authority over their water resources.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CLARIFY THE FEDERAL GOVERNMENT'S LIMITED ROLE IN WATER DISTRIBUTION

If the Ninth Circuit's ruling is allowed to stand, water uses will have to cope with competing federal and state water management authorities. This is an unworkable situation.

> A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.

California, 438 U.S. at 668-69 (characterizing exerting federal control over water as "something little less than suicidal.") *Id.* at 667. The Ninth Circuit should have heeded the words of this Court and Congress. Instead, the Ninth Circuit insists this case centers around land use authority and ignores the fact that its holding completely undermines more than 150 years of water law and will leave states and holders of vested water rights to try and sort out the confusion.

This decision would also turn California's system of water rights on its head. Under the California dual system of water rights, which recognizes both riparian and appropriative rights, the right to use water under an appropriative right depends on whether water is available for diversion under the established system of priority. Given the numerous claimants seeking to utilize this scarce resource – water – adherence to the priority system is essential. Unauthorized federal intervention into this complex system undercuts the foundation of the system for allocation of water rights: first in time, first in right. The United States Supreme Court has previously recognized the implications of such disruption. "In the arid parts of the West, . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." *New Mexico*, 438 U.S. at 699. In times of shortages, which occur frequently in the West, water is delivered first to the holders of the most senior water rights and distributed accordingly. Further the right to actually put the water to beneficial use is the very essence of a water right. ("The right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.") Unlike other species of property

where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of value." *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001) (Internal citations omitted).

In this instance the Ninth Circuit denied Petitioners the right to use their water, notwithstanding their vested water right was quite senior with a priority date of 1909, and reallocated the water by keeping it instream where other junior water right holders who are not subject to USFS regulation may use it. Reallocating water to in-stream flow as the federal government did here, "will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *New Mexico*, 438 U.S. at 705. Under the prior appropriation doctrine, whomever holds the most junior water right would be the first entity affected by the reduction. This reallocation is contrary to the doctrine of prior appropriation, renders the vested water right completely useless, and would be illegal under state water law. This is just one example of the confusion created by the Ninth Circuit's decision. The petition for certiorari should be granted to ensure that the long recognized exclusive control of water rights by individual states is adhered to by all parties regardless of whether the water at issue flows through federal lands.

III. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ENSURE THAT FEDERAL LAND USE AUTHORITIES CANNOT BE USED TO EVISCERATE STATE WATER LAW

The Ninth Circuit's holding entitles the federal government to exert control over water resources that

originate on or flow through federal lands so long as the federal government does so under the guise of characterizing the decision as a land management decision. This is contrary to the holding in *New Mexico*, where the court made it very clear that the federal land management laws creating and governing national forests do not provide the federal government with the authority to obtain minimum instream flows for fish, independent of state law. 438 U.S. at 714-18. Any such rights must be obtained by compliance with the state's water rights system and in the same manner as any other water user. The same is true regarding the ESA. It clearly does not provide this expansive authority over state water rights.

The Ninth Circuit's attempts to distinguish this Court's holding in *New Mexico* are unpersuasive. The Ninth Circuit stated that the *New Mexico* case "did not address the power of the Forest Service to restrict the use of rights-of-way over federal land." *Okanogan County*, 347 F.3d at 1086. By arguing semantics, the Ninth Circuit ignored this Court's finding that "Congress has assured that the waters which flow through national forests **are available for use by state appropriators** by authorizing rights-of-way for ditches to carry the water to agricultural, domestic, mining, and milling uses." *New Mexico*, 438 U.S. at 713 (citing the Right-of-Way Permit Act of 1891, 43 U.S.C. § 946, *et seq.*; Right-of-Way Permit Act of 1901, 43 U.S.C. § 959; Forest Right-of-Way Act of 1905, 16 U.S.C. § 524 (repealed in part 1976)). The Ninth Circuit also ignored *New Mexico's* in-depth discussion regarding the federal government's authority under the Organic Act and the Multiple-Use Sustained-Yield Act.

This Court previously rejected the USFS's claims of authority to reserve water for the benefit of fish and

wildlife under the Organic Act and also noted that, while the Multiple-Use Sustained-Yield Act of 1960 expanded the national forests' purposes, "Congress did not intend thereby to expand the reserved rights of the United States." *New Mexico*, 438 U.S. at 711-13. Further, "there is no indication that it [Congress] believed the new purposes to be so crucial as to require a reservation of additional water. By reaffirming the primacy of a favorable water flow, **it indicated the opposite intent.**" *Id.* at 716.

> Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress' [sic] **principled deference to state water law in the Organic Administration Act of 1897** and other legislation.

Id. at 718.

In light of this express holding by the Court, the Ninth Circuit's decision that the USFS had the authority to seize Petitioners' vested water rights for the purported purpose of benefiting fish (*Okanogan County*, 347 F.3d at 1084-86), represents a misinterpretation of both federal statute and this Court's precedent. None of the Congressional acts that provide authority to the Forest Service repealed or otherwise modified the federal government's stated policy to respect and defer to vested state water rights, and the right to use established ditches and canals, when managing national forest lands. Rather, the Federal

Land Policy and Management Act of 1976 ("FLPMA")[12] contained an express provision stating: "Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way or authorization existing on the date of approval of this Act." Thus, an act to revoke or limit a party's permit to utilize a ditch or canal on Forest Service land that existed prior to 1976 is not only without authority, but counter to express statutory provisions. The petition for certiorari should be granted in order to correctly apply both the law and legal precedent in the Ninth Circuit.

Lastly, the Ninth Circuit's ruling ignored established law that Section 7 of the ESA, 16 U.S.C. § 1536 *et seq.*, does not add to federal agencies' existing authority and therefore provides no more authority than the federal land management statutes at issue. As discussed above, these federal land management statutes do not provide the USFS with the authority to preempt water law by reallocating Petitioners' vested water rights to instream uses. Because these statutes do not contain this authority, the ESA cannot bestow this authority on the USFS through the backdoor by characterizing it as a "land management" rather than "water rights" issue.

"The ESA does not grant powers to federal agencies that they do not otherwise have." *Okanogan County*, 347 F.3d 1085. Thus, while the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its

[12] Pub.L. No. 94-579, § 701(a), 90 Stat. 2743, 2786, *reprinted in* 43 U.S.C.A. § 1701 historical note.

enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 34 (D.C. Cir. 1992) (internal citations omitted). This is made clear by the regulations implementing the Section 7 consultation process. In recommending "reasonable and prudent alternatives," the alternatives are to "refer to alternative actions . . . that can be implemented . . . consistent with the scope of the Federal agency's legal authority and jurisdiction. . . . " 50 C.F.R. § 402.02 (2004). Therefore, the Section 7 consultation process does not allow the regulation of those aspects of a federally permitted project over which the agency has no authority. *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001). Further, a federal agency's mere involvement in private conduct, or the retention of discretionary control, does not confer upon a federal agency the power to regulate every aspect of a private activity. *Id.* at 1083.

The Ninth Circuit relies on FLPMA for the proposition that the USFS had the requisite authority to impose minimum instream flows as conditions to the rights-of-way permits. Their reliance is misplaced. They recognize provisions in the savings clause of FLPMA which protect vested rights existing on the date of approval of the Act but then completely ignore the fact that the exercise of the supposed authority will effectively terminate vested water rights. They justify this by focusing only on the rights-of-way and conclude that such rights-of-way are not vested land use rights. That may be true but is irrelevant and ignores the fact that one of the bundle of sticks included with a water right is its point of diversion. A portion of FLPMA's savings clause that the Ninth Circuit failed to mention reads: "[n]othing in this Act shall be construed . . .

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public land; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resource development or control."[13] The Petitioners in this case have vested water rights and any actions by the federal government under FLPMA are subject to these valid existing rights. These rights do not go away because the Ninth Circuit ignores them.

In light of the implementing regulations and the Ninth Circuit's own case law, the only aspect over which the federal government had any control was the maintenance of the ditch conveying Petitioners' water through federal lands. Thus, the reasonable and prudent alternatives can only be applied to land management activities. In fact, if this truly were a land management case, as opposed to a case involving water rights, the federal government should have only attempted to condition the ditch maintenance activities that may have jeopardized the listed fish species. The federal government made a fundamental error when it expanded the scope of its Section 7 consultation to include Petitioners' vested water rights because the federal government has no authority over these water rights. Rather than rectifying this error, the Ninth Circuit misinterpreted Congressional intent and long-standing precedent and compounded this error. These actions threaten the very basis of water law in all states under the Ninth Circuit's jurisdiction. Therefore, the

[13] Pub.L. No. 94-579, § 701(g), 90 Stat. 2743, 2787, *reprinted in* 43 U.S.C.A. § 1701 historical note.

petition for certiorari should be granted to correct these mistakes and respect states' primacy over water.

This restriction on the scope of federal authority does not leave NMFS without the ability to implement and enforce its responsibilities under the ESA. The Ninth Circuit would have you believe that the basis of Appellant's argument below is that compliance with the ESA was not authorized because such compliance would deny the exercise of their vested rights. After setting up this false argument they spend the rest of the opinion disagreeing with it. The argument of the Appellant's was that imposition of the instream flow requirements under the guise of Section 7 of the ESA was beyond the scope of Forest Service authority. Compliance with the ESA is a separate matter to be handled by NMFS under Section 9. Enforcement through Section 9 serves the goals of the ESA, without undermining and circumventing state water law and vested water rights. Section 9 applies to all nonfederal actions and parties, prohibits the "take" of a listed species, and is more comprehensive in its scope of protection than is Section 7. Through Section 9 the ESA can most effectively be enforced while leaving intact western water law and the entire economy of the west which, in large measure, is based on the foundation of secure, vested water rights.

CONCLUSION

Amicus Farm Bureau respectfully urges this Court to grant the petition for certiorari.

Respectfully Submitted,

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